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No. —

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RAFAEL HERNANDEZ COLON, individually and as Governor of the Commonwealth of Puerto Rico; Mercedes Otero de Ramos, individually and as Administration of the Corrections Administration of the Commonwealth of Puerto Rico, and Lorenzo Villalba, Juanita Gómez, Julio Acevedo Ascencio, individually and as members of the Parole Board of the Commonwealth of Puerto Rico,

Petitioners,

v.

CARLOS MORALES FELICIANO, *et al.*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

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December 26, 1989

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QUESTIONS PRESENTED

1. Does the failure of Commonwealth officials to fully comply with a stipulation to provide a minimum of 35 square feet per prisoner, by itself, support a ruling by a federal court of appeals that such failure violates the Eighth Amendment, and that, for this reason, substantial compliance is insufficient to avoid civil contempt fines, as to which the decisions of this Court and of other courts of appeals are in conflict?

2. Does a federal Court of Appeals, even where an Eighth Amendment interest is involved, in reviewing the validity of civil contempt fines, correctly apply a strict standard of compliance with a stipulation to improve crowded prison conditions that considers only the interests of the prisoners, instead of a flexible standard that weighs, along with the interests of the prisoners, the interests of the state in law enforcement and public security, good faith efforts to fully comply, and substantial compliance, as to which the courts of appeals are in conflict?

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IN THE

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OCTOBER TERM, 1989

No. 89- ___

RAFAEL HERNANDEZ COLON, individually and as Governor of the Commonwealth of Puerto Rico; Mercedes Otero de Ramos, individually and as Administrator of the Corrections Administration of the Commonwealth of Puerto Rico, and Lorenzo Villalba, Juanita Gómez, Julio Acevedo Asencio, individually and as members of the Parole Board of the Commonwealth of Puerto Rico,

Petitioners,

v.

CARLOS MORALES FELICIANO, *et al.*,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, Rafael Hernández Colón, Governor of the Commonwealth of Puerto Rico, Mercedes Otero de Ramos, Administrator for the Corrections Administration ("CA"), and the current members of the Parole Board of the Commonwealth of Puerto Rico, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in the above entitled proceeding on September 26, 1989.

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals is reported in *Carlos Morales Feliciano v. Parole Board of the Commonwealth of Puerto Rico, et al.* No. 88-1942, Slip op. (1st Cir. Sept. 26, 1989), and appears as Appendix A. The opinion is reported in 887 F. 2d. 1 (1989). The underlying opinions of the District Court appear as Appendixes B, C and D.

JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1989. This Court has jurisdiction to review the decision of the Court of Appeals for the First Circuit pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioners are the Governor, the Corrections Administrator, and members of the Parole Board of the Commonwealth of Puerto Rico ("Commonwealth officials"). They are presently the defendants in a class action brought in 1979, in the United States District Court for the District of Puerto Rico during the administration of a former governor by the respondents, prisoners in correctional institutions in Puerto Rico ("the prisoners"). Respondents alleged in that action system wide conditions of confinement in violation of the Eighth Amendment. In their answer, the then defendants Commonwealth officials denied any Eighth Amendment violations, and that issue has not been finally adjudicated and is still pending in the District Court.

In 1980, the District Court found that the conditions of confinement in the prisons of Puerto Rico

violated the Eighth Amendment and issued a preliminary injunction and a number of orders, only one of which is relevant to this petition. That order directed the then defendants to provide 35 square feet per inmate on a temporary basis and to submit plans to permanently provide at least 55 square feet per inmate in dormitories and 70 square feet in individual cells. *Morales Feliciano v. Romero Barceló;*, 497 F. Supp. 14 (D.P.R. 1979).

During the period 1980-1984, the governor and correctional officials then in office, defendants in the law suit, provided little additional financial resources and made few improvements in prison conditions for the purpose of complying with the District Court's order. Despite motions by the prisoners for contempt and sanctions, the District Court, during this five year period, did not find it necessary to enforce its 1980 order against these defendants through a contempt order or any sanctions.

Upon taking office in January, 1985, the present Commonwealth officials announced a public policy of comprehensive prison reform, committed to a substantial expenditure of funds for a massive program of capital construction and rehabilitation of prison facilities in Puerto Rico. Early in 1986, only one year after the present Commonwealth officials took office, and prior to the implementation of their major prison reform program, the District Court began an aggressive review of compliance with its 1980 order, found unconstitutional conditions continuing in the prisons, and appointed monitors. *Morales Feliciano v. Hernandez Colon*, 672 F. Supp. 627 (D.P.R. 1987). Appendix C.

Based on their prison reform construction program and prison population increase estimates, on September 26, 1986, the Commonwealth officials entered into a voluntary stipulation in which they agreed to provide 35 square feet per inmate by December 31, 1986, and 55 square feet per inmate by December 31, 1987. On January 26, 1987, the District Court formally approved this stipulation to improve crowded prison conditions.

On February 26, 1987 the monitors filed their Second Report which, despite recognizing significant progress, showed that during the period of January 26-30, 1987, the Commonwealth officials had objectively fallen short of compliance with the stipulation. As a result, the prisoners requested and the District Court held a contempt hearing during May 1987. At this hearing, the Commonwealth officials opposed the application for contempt on the grounds that full compliance was made impossible by an unanticipated inmate growth at twice the projected rate on which the overcrowding stipulation was premised, and that substantial compliance in view of significant increase in correctional capacity, had been achieved. In 1985 the Commonwealth officials estimated that the annual growth rate for the inmate population over the period 1985-1990 would be 2.75%. The CA, on the basis of its internal studies, revised upward the predicted growth rate to 9.1%. Had the projections held, Commonwealth officials showed they would have complied with the stipulation. Instead, the population increased by 18%, twice the projected rate, making strict compliance impossible.

On July 23, 1987, the District Court, while recognizing the institutional progress achieved, nonetheless

rejected the Commonwealth officials' defense and found them in contempt. (Appendix D at p.44a). It imposed a $50,000.00 retroactive sanction as well as a prospective daily fine of $10 for each prisoner held in excess of the 35 square feet standard in any housing unit. Rather than appealing the contempt order, on July 24, 1987 Commonwealth officials moved to modify the overcrowding stipulation timetable under Fed.R.Civ.P. Rule 60(b). They again stressed the remarkable progress made in reducing overcrowding: the opening of 1,490 new spaces and 446 remodeled spaces—all at 55 to 70 sq. ft. per inmate—since the stipulation was signed; the substantial construction program under way which would soon provide some 2,632 new spaces at 55 sq. ft. per inmate; the improvement of parole procedures; the massive transfer of inmates between institutions; and the unforeseeable inmate population explosion as factors warranting an extension of the 35 sq. ft. timetable.

On September 14, 1987, the court denied the modification request. *Morales Feliciano v. Hernández Colón*, 672 F.Supp. 627 (D.P.R. 1987). Appendix C. The District Court acknowledged the "building project undertaken by the Correction Administration in 1987 to increase dramatically the available beds for housing inmates," 672 F.Supp. at 637, and the unanticipated increases in prison population on which the Commonwealth officials relied. Using a strict standard, however, the court rejected the population increase argument, noting: "the difficulty of projecting rates of growth in an inmate population provides a powerful reason for not allowing the obligation of defendants to provide minimally adequate habitation to shift with the prevailing prediction." 672 F.Supp. at 632 n.9.

During early 1988, the Commonwealth construction program substantially matched population growth and compliance with the 35 sq. ft. standard was virtually achieved. In the 28th Report, for example, the monitors informed that during the first week of January all institutions complied with the overcrowding stipulation, except the women's prison which had an excess of four prisoners. As the year passed, however, construction delay due to tropical rains and the continued unanticipated rate of growth forced two institutions, the state penitentiary and the women's prison, out of compliance. The prisoners once again requested contempt and an increase in the fines. The Commonwealth officials opposed the request for increased fines on the basis of their efforts at compliance the remarkable increase achieved in prison capacity, the unavoidable weather delays in the construction program, their efforts at expanding parole procedures and the need to give the newly established Expedited Bail Program time to operate.

On August 15, 1988, the District Court, without a hearing, rejected the Commonwealth official's defense and exponentially increased the contempt fines. It increased the daily fines from $10 to $50 per inmate in excess of the stipulated capacity and provided that the daily fine would increase by $10 each month. Appendix B at p.14a. At last count, in November of 1989, the Commonwealth was paying $200 per day for each inmate in excess of the 35 sq. ft. standard, for total fines approximating $30,000,000.00. These are the highest civil contempt fines levied by a federal court in the history of the Nation. Since November 1, 1989, none of the institutions has exceeded its maximum capacity at 35 sq. ft. per inmate and a sub-

stantial majority of inmates has been provided with at least 55 square feet.

Commonwealth officials appealed the District Court's imposition of additional civil contempt fines to the First Circuit. They contended in the appeal that the District Court had abused its discretion in increasing the fines because there had been substantial compliance with the stipulation and insofar as there had not been full compliance, it was due to unexpected population growth and unanticipated construction delays caused by bad weather. While acknowledging the Commonwealth officials' accomplishments in their prison reform program, the First Circuit held they were insufficient to excuse contempt. Assuming an Eighth Amendment harm to prisoners because of the lack of full compliance with the stipulation, the First Circuit ruled, in effect, that strict compliance was necessary to offset this harm and affirmed the order of the District Court.

REASONS FOR GRANTING THE WRIT

I The First Circuit's Ruling that the Commonwealth Officials' Substantial Compliance with the Stipulation is Insufficient to Avoid Additional Civil Contempt Fines on the Ground that the Harm to Prisoners caused by Lack of Full Compliance with the Stipulation is Cruel and Unusual Punishment Prohibited by the Eighth Amendment is in Conflict with the Decisions of This Court and of Other Circuits.

The affirmance by the First Circuit of the order of the District Court imposing additional civil contempt fines on Commonwealth officials was based solely on the court's assumption that their failure to fully comply with a court approved stipulation to provide 35

square feet per inmate by December 31, 1986, and 55 square feet by December 31, 1987, violated the Eighth Amendment. In response to the argument that their substantial compliance with the stipulation made the imposition of additional fines improper, the First Circuit recognized that this was the general rule followed by courts of appeals, but stated:

> We note, however, that "substantiality" of compliance depends "upon the nature of the interest at stake and the degree to which noncompliance affects that interest" . . . Here, the interest at issue—*the prisoner's Eighth Amendment interest*—is "fundamental" . . . the relevant harm (confinement in an area smaller than 5 by 7 feet) is significant; the number of prisoners suffering that harm (7 to 10 percent of the prison population) is large; and the time since entry of the remedial decree is long. We cannot say that compliance is so "substantial" as to invalidate the finding of contempt.

Appendix A at p. 8a (Emphasis added).

Whether, the First Circuit was correct in its application of a strict compliance standard, even where an Eighth Amendment interest is involved, is presented below in the second reason for granting this writ. Here, the question is whether the First Circuit was correct in assuming that Commonwealth officials violated the Eighth Amendment rights of the prisoners by not fully complying with the particular stipulation involved in this case.

All that was before the First Circuit for its review was the validity of the imposition of additional civil

contempt fines by the District Court because of the failure to fully comply with the stipulation for the provision of specific living space conditions for prisoners. There have been no contempt findings or sanctions imposed by the District Court on Commonwealth officials for any of the other orders of the District Court issued to enforce the temporary injunction, relating to hygiene, medical care, and other prison conditions which may involve Eighth Amendment interests. These matters were not before the First Circuit, but are still being monitored by the District Court with the cooperation of Commonwealth officials.

The stipulation, however, which was before the First Circuit, bound Commonwealth officials to physical space commitments that went beyond Eighth Amendment requirements. Yet, as the record of this case demonstrates, and the District Court and First Circuit acknowledged, Appendix A at p.9a, petitioners did, in good faith, embark on their promised construction program and follow other procedures to meet their obligations under the stipulation. At times they realized the minimum requirement of 35 square feet per inmate, but constantly lost ground because of unanticipated prison population increases and bad weather conditions.

The disagreement between Commonwealth officials and the District Court, which was the basis for the appeal to the First Circuit, was the refusal of the District Court to consider the Commonwealth officials' substantial compliance and reasons for lack of full compliance in determining whether additional sanctions were warranted. However, despite their failure to be in full compliance with the stipulation, the

Commonwealth officials did not, for that reason, violate the prisoners' Eighth Amendment rights, as the First Circuit assumed.

This Court has held that restricted living space conditions for prisoners do not, themselves, constitute cruel and unusual punishment. *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). In *Rhodes*, the district court had found and the Court of Appeals for the Sixth Circuit had affirmed that double celling, which required two prisoners to share a cell containing 63 square feet ($31^1/_2$ square feet per prisoner), constituted cruel and unusual punishment. This Court reversed, holding that "the Eighth Amendment prohibits punishments which . . . 'involve the unnecessary and wanton infliction of pain'. . ." and that living space restrictions on prisoners, caused by double celling, did not meet this constitutional standard.

In this case, the Commonwealth officials had committed themselves in the stipulation to provide minimum living space for each prisoner that was even greater than the limited space the double-celled prisoners had in *Rhodes*, and which this Court ruled did not, by itself, constitute cruel and unusual punishment. Consequently, the failure to fully comply with the stipulation, by itself, would not, under this Court's ruling, constitute cruel and unusual punishment.

The First Circuit's inconsistent ruling with *Rhodes* appears to be based on its erroneous belief that Commonwealth officials "no longer dispute" the legal validity of the district court's preliminary injunction and orders. Appendix A at p.7a. Consequently, the First Circuit treats the voluntary stipulation, approved by the court, as equivalent to a consent decree, conced-

ing for the purpose of final judgment Eighth Amendment violations.

The record clearly refutes this assumption by the First Circuit. The Commonwealth officials have denied in their answer the prisoners Eighth Amendment allegations, which remain in dispute in the District Court proceeding. Their willingness to enter into the stipulation to improve the crowded prison conditions was based not on any concession of Eighth Amendment violations, but on their own commitment to provide decent prison conditions, as well as to avoid a contempt finding, pending final adjudication on the merits of the prisoners' Eighth Amendment allegations.

Further, the record also demonstrates that the District Court patterned its preliminary injunction order, relating to the specific square footage per prisoner with which, with some modification, Commonwealth officials agreed to comply in their stipulation, on standards recommended by correctional experts and associations, which the District Court had reviewed. See also Appendix A at p.11a. Although the Commonwealth officials bound themselves to meet these goals recommended by correctional experts, they do not violate Eighth Amendment requirements, by failing to fully meet them.

Subsequent to the District Court's preliminary injunction in this case, this Court ruled in *Rhodes* that the prisoner living space standards recommended by correctional experts are not consitutional standards, but only aspirational, though desirable, goals. Quoting from its earlier opinion in *Bell v. Wolfish*, 441 U.S. 520 at 543-544, n. 27, 99 S.Ct. 1861, 1876, n. 27, 60 L.Ed.2d 447 (1979), this Court said:

> ". . . such opinions may be helpful and relevant with respect to some questions, but they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question".

Rhodes v. Chapman, supra, at 348, n. 13. This Court added, "these considerations properly are weighed by the legislature and prison administration rather than a court". *Id.* at 349.

The First Circuit also ignored a major contention concerning why strict compliance with the stipulation should not be required. The Commonwealth officials argued that their good faith efforts to provide the specific living space per prisoner they had agreed to in the stipulation were constantly being frustrated by unanticipated increases in the prison population. The District Court refused to consider this explanation, saying that petitioners must take the blame for their own inaccurate predictions. Appendix C at p.29a, n. 9. The First Circuit ignored this issue because of its assumption, erroneous under *Rhodes*, of an Eighth Amendment violation.

This Court, however, recognized "the extreme difficulty" of predicting increases in prison population as a valid consideration for judging the ability of prison administrators to plan adequate living space per prisoner on the basis of anticipated prison population. Contrary to the position taken by the District Court in this case, this Court said in *Rhodes:*

> The dissent also makes much of the fact that SOCF was housing 38% more inmates at the time of trial than its "rated capacity". Ac-

> cording to the United States Bureau of Prisons, at least three factors influence prison population: the number of arrests, prosecution policies, and sentencing and parole decisions. Because these factors can change rapidly, while prisons require years to plan and build, it is extremely difficult to calibrate a prison's "rated" or "design capacity" with predictions of prison population. . .

Id, at 349, n. 15. In addition to this difficulty of anticipating increases in prison population, this Court also noted at page 351, n. 16 that "the problems of prison population and administration have been exacerbated by the increase of serious crime and the effect of inflation on the resources of states and communities".

This Court's reference to the impact on already crowded prisons of increased crime and law enforcement activity in 1981 makes this case all the more compelling in 1990 for review by this Court. *Rhodes* provides much needed guidance to state and federal law enforcement and correctional agencies in their accelerated programs against serious crime and drugs. The wooden and non-constitutionally mandated restrictions placed by the District Court and the First Circuit on prison and law enforcement officials of Puerto Rico, is directly at odds with this Court's ruling in *Rhodes*, and threaten to stall, if not prevent, the anti-drug efforts of the Commonwealth. Should the First Circuit's precedent be followed elsewhere, this country's all out war on drugs would be in jeopardy.[1]

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[1] The General Accounting Office reported on December 3, 1989

The First Circuit's decision is also in conflict with the decisions of the District of Columbia and the Eighth Circuit. The First Circuit based its determination of an Eighth Amendment violation solely on the Commonwealth officials failure to fully provide each prisoner, in accordance with the stipulation, a minimum of 35 square feet. The D.C. Circuit in *Inmates of Occoquan v. Barry*, 844 F.2d 828 (D.C. Circuit 1988) specifically rejected the district court's finding of an Eighth Amendment violation based on the District of Columbia's failure to provide each prisoner a minimum amount of square footage of living space. Applying this Court's ruling in *Rhodes*, Judge Starr said:

> . . . *the deprivations that trigger Eighth Amendment scrutiny are deprivations of essential human needs.* Specifically, the conditions the *Rhodes* majority thought significant were these: "deprivations of essential food, medical care,or sanitation." *id.* When measured against this demanding yard stick, the

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that federal prison population has doubled since 1980 and now stands at 56 percent above capacity. The report also said that state prisons are operating at 23 percent over capacity and that 35 states and the District of Columbia are operating under court orders of consent decrees relating to prison crowding. Representative Charles B. Rangel, who had requested the report, stated that because of the drug problem and other social conditions relating to poverty, "we are likely to see continued record overcrowding no matter how many prisons we build". Washington Post, December 4, 1989, p. A4. This report demonstrates the futility and lack of reality of the First Circuit's strict compliance ruling, as well as the damage it can do to violent crime and drug enforcement efforts if it is generally followed.

> allegation of overcrowding did not even come close to establishing a constitutional violation.

Id. at 836 (emphasis in original).

Similarly, the Eighth Circuit, in *Cody v. Hillard*, 830 F.2d 912 (8th Cir. 1987), held that crowded prison living conditions caused by double celling did not constitute cruel and unusual punishment prohibited by the Eighth Amendment. The Eighth Circuit said:

> The conditions described in this record cannot be said "to inflict pain or amount to punishment" nor can prison administrators making "sincere efforts" be said not to be acting in "good faith." The present case is light years removed from the torture, cruel deprivation, and sadistic punishment with which the Cruel and Unusual Punishment Clause is concerned.

Id. at 915.

In both the D.C. and Eighth Circuit cases, the district courts had found, as did the District Court in this case, that deficient conditions, other than crowding, existed in the prisons. These conditions related to medical care, food, sanitation, hygiene, etc. However, the district courts in those cases, as did the District Court here, chose the prison crowding conditions as the focus for exercising their coercive powers. Rejecting this choice, the Eighth Circuit, in *Cody*, said:

> Whatever the merit of these findings, there has been no showing, and the District Court has made no finding, that the elimination of

> double-celling will alleviate these problems to any perceptible degree. *An appropriate remedy would relate to correction of the constitutionally deficient conditions that have been found to exist, if any there be, rather than to the elimination of double-celling.*

Cody v. Hillard, 830 F.2d at 914 (emphasis added).

The First Circuit made no similar analysis in this case of the types of prisoner deprivations that constitute Eighth Amendment violations under *Rhodes*. Contrary to the rulings of this Court and of the D.C. and Eighth Circuits, the First Circuit peremptorily assumed that the failure of Commonwealth Officials to provide prisoners the stipulated minimum square footage of living space violated their Eighth Amendment rights. For this reason, this Court should grant this writ and remand to the First Circuit to apply the correct balancing test for determining whether substantial compliance with the stipulation was sufficient to avoid additional civil contempt fines, where, as in this case, there is no Eighth Amendment violation.

II The Strict Standard Adopted by the First Circuit for Determining the Validity of Additional Civil Contempt Fines for Failure to Fully Comply with a Stipulation Whose Modification was Denied by the District Court is in Conflict with the Flexible Standard Applied in Cases of Institutional Reform Litigation by Other Courts of Appeal, And Serves as a Disincentive to Consensual Efforts of States to Reform Improper Conditions of Confinement.

A. The strict standard of compliance adopted by the First Circuit is contrary to the flexible standards

adopted by other courts of appeals.[2] The Fourth Circuit provides the best exposition of the flexible standard. In *Plyler v. Evatt*, 846 F.2d 208 (4th Cir. 1988), the district court denied the Corrections' Department motion to modify an overcrowding consent decree[3] due to unanticipated increase in inmate population; instead, it ordered the early release of approximately 700 inmates over the next 3 months. In vacating and remanding for modification, the Fourth Circuit articulated the following standard:

> [T]he courts must balance the competing interests of the prisoners, the Department of Corrections, and the public. "[T]he interest of the prisoners in immediate and strict enforcement of the consent decree" must be weighed against the Department of Corrections' interest in "the orderly administration of the corrections system" and the public interest "in having lawful sentences carried out and in not having parolees put at large without sufficient supervision."

846 F.2d at 211 (citations omitted). The court distinguished *United States v. Swift & Co.*, 286 U.S. 106

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[2] The Eighth Circuit has also followed the strict standard *Rajender v. U. of Minnesota*, 730 F.2d 1110, 1116-1117 (8th Cir. 1984); *Humble Oil and Ref. Co. v. American Oil Co.*, 405 F.2d 803, 813 (8th Cir.(Blackmun, J.), *cert denied*, 395 U.S. 905 (1969).

[3] The Fourth Circuit case and most of the other cases where circuit courts have adopted the flexible standard, involve denials of motions to modify a consent decree. In the instant case, involving a District Court's penalizing less than strict compliance with a voluntary stipulation, the application of a flexible standard, instead of the strict standard used by the First Circuit, is all the more compelling.

(1932); *Humble Oil & Ref. Co. v. America Oil Co.*, 405 F.2d 803, 813 (8th Cir.), *cert. denied*, 395 U.S. 905 (1969) and *Holiday Inns Inc. v. Holiday Inn*, 645 F.2d 239 (4th Cir.), *cert. denied*, 454 U.S. 1053 (1981), finding that although they may "set a strict standard for modification of consent decrees between private parties this standard is inappropriate in institutional reform litigation for 'the unique nature and demands of institutional reform litigation necessitates a more flexible approach to modification.' " 846 F.2d at 211-212, quoting from *Ruiz v. Lynaugh*, 811 F.2d 856, 860-61 (5th Cir. 1987)(citing *New York State Ass'n. for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 970 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983). See *Nelson v. Collins*, 659 F. 2d 420 (4th Cir. 1981).

A similar approach was adopted by the Second Circuit in *New York State Ass'n. for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 970 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983), where the district court denied a motion for modification and found defendants in "noncompliance" with a consent decree mandating substantial population reduction at a New York institution for the mentally retarded. The Second Circuit reversed the finding of noncompliance and remanded for a modification of the consent decree since the district court "imposed far too drastic a standard upon defendants' request for modification." 706 F.2d at 969. The court criticized the lower court rigid interpretation, asserting that:

> It is well recognized that in institutional reform litigation such as this judicially imposed remedies must be open to adaptation when unforeseen obstacles present themselves, to the improvement when a better understand-

> ing of the problem emerges, and to accommodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom.

706 F.2d at 969. Judge Friendly then proceeded to enumerate a host of commentators that endorsed the flexible standard in the context of institutional reform litigation.[4] The Second Circuit concluded that "[w]hen a case involves drawing the line between legitimate interests on each side, modification will be allowed on a lesser showing." 706 F.2d at 969.

The Third Circuit has articulated a standard that coincides with the flexible standard of the Second, and Fourth Circuits. In *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114 (3d. Cir. 1979), *cert, denied*, 444 U.S. 1026 (1980), the court upheld a requested modification in a complex, ongoing remedial consent decree, saying:

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[4] *See generally*, Chayes, *The Supreme Court—1981 Term—Foreword: Public law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 56 (1982) Jost, *From Swift to Stotts and Beyon: Modification of Injunctions in the Federal Courts*, 64 Texas L. Rev. 1101 (1986). Rudenstine, *Institutional Injunctions*, 4 Cardozo L. Rev. 611, 613 (1984); Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale L. Rev. 635, 640 (1982); Fiss, *The Supreme court—1978 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 49 (1979); Diver, *The Judge as Political Power Broker: Superintending Structural Change in Public Institutions*. 65 Va. L. Rev. 43, 63 (1979); Coffin, *The Frontiers of Remedies: A Call for Exploration*, 67 Calif. L. Law. 983, 989 (1979); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 Column. L. Rev. 784, 818 (1978); Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428, 436 (1977); Chayes, *The Role of the Judge in Public law Litigation*, 89 Harv. L. Rev. 1281 (1976).

> When an affirmative obligation is imposed by court order on the assumption that it is realistically achievable, the court finds that the defendants have made a good faith effort to achieve the object by the contemplated means, and the object nevertheless has not been fully achieved, clearly a court of equity has power to modify the injunction in light of experience.

602 F.2d at 1120-21. Thus, *Shapp* has been cited as authority for the flexible standard modification. *Ruiz v. Lynaugh*, *infra*, 811 F.2d at 861; *Twelve John Does v. District of Columbia*, *infra*, 861 F.2d at 298; *Duran*, 760 F.2d at 758.

Similarly, in *Duran v. Elrod*, 760 F.2d 756 (7th Cir. 1985), the Seventh Circuit noted with approval the recent decisions suggesting a more liberal standard in cases of decrees supervising public institutions. Although it disclaimed a need for formal adoption of the flexible standard because the facts of the case required modification of the underlying overcrowding decree under either standard, in practice it applied the flexible standard. The court considered "not only the burden of the modifications on the plaintiffs, and the benefits of the modifications to the county government, but also the benefits and burdens to the public." 760 F.2d at 759. See *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1020 (7th Cir. 1984) (en banc)(dictum); *But cf., United States v. Chicago*, 663 F.2d 1345, 1359-60 (7th Cir. 1981) (en banc)(strict standard).

The most recent endorsement of the flexible standard is the District of Columbia Circuit in *Twelve John*

Does v. District of Columbia, 861 F.2d 295, 298 (D.C. Cir. 1988). There, Judge Mikva noted the trend to use the flexible approach where the decree stems for institutional reform and used a test that weighed the danger to the public of enforcement against the interest of the prisoners in compliance. 861 F.2d at 298. In *Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir, 1987), the majority opinion for the Fifth Circuit recognized the existing case law dichotomy between the strict standard traditionally applicable to modification of consent decrees and the emerging "more flexible approach to modification" in the "institutional reform arena." 811 F.2d at 861. The majority, however, found it unnecessary on the facts of the case to choose between the two standards. Judge Madden Hill, however, in a well-reasoned opinion, concurred exclusively to "explicitly endorse the flexible approach for modification of institutional reform consent decrees." 811 F.2d at 863-864 (Madden Hill, J., concurring).

The strict standard adopted by the First Circuit decision in this case is at odds with the flexible standard adopted by the Second, Third, Fourth and District of Columbia Circuits. Contrary to the decisions of those circuits, the First Circuit weighed only one interest—that of the prisoners. It ignored the interests of the Commonwealth and the public concerning law enforcement and prison security. The Fifth and the Seventh Circuit, while recognizing the existing dichotomy of standard, have formally withheld adoption of the flexible approach. The conflict between the circuits is well developed and recognized by the Court of Appeals themselves. *See Plyler* 846 F.2d at 211-212; *Ruiz*, 811 F.2d at 861, 863-64; *Rajender*, 730 F.2d at 1116 n. 4; *Duran*, 760 F.2d at 758. The

existing conflict is comparable to the conflict between circuits in *Bell v. Wolfish*, 441 U.S. 520, 524 (1979), as to the compelling versus reasonable standard to determine conditions of confinement of pretrial detainees. Thus, the predicate for the issuance of a writ of certiorari is present.

B. A particular factor that should influence this Court to grant the writ is that this conflict between the circuits concerns a national crisis shared by most states across the Nation. The prison population is rising more rapidly than the state's capacity to house the inmates.[5] As a result, the correctional systems across the country are becoming increasingly saturated, with the attendant Eighth Amendment concerns these conditions engender.[6] At present, 38 of the 50 states and the federal government have a total of 112,290 committed inmates in excess of their rated prison capacity.[7] If the fines affirmed by the First Circuit applied to them, they would have to pay approximately $22,000,000.00 daily or $8 billion a year. Furthermore, according to the Department of Justice's Bureau of Justice Statistics during the first half of 1989 inmates intake grew by 46,004 for a nation-

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[5] As stated in *Rhodes v. Chapman*, 452 U.S. 337, (1981): "Since our decision in *Martínez*, the problem of prison population and administration have been exacerbated by the increase of serious crime and the effect of inflation on the resources of the states and communities." 452 U.S. at 351 n. 16.

[6] See Appendix E at p. 63a, summary prepared by the ACLU's National Prison Project of states who are or have been under court orders concerning conditions of confinement.

[7] *See* Appendix F at p. 80a. The source of Appendix F is The Corrections Yearbook 1989 (Criminal Justice Institute N.Y. 1989) at p. 24.

wide total population of 673,565. This increase in six months is larger than any increase in a twelve month period during the last 64 years.[8] With the War on Drugs declared by the Bush Administration this trend is surely to be accentuated.

In order to attend Eighth Amendment concerns a majority of states have adopted public policies that coincide with the claims of inmates and take the form of voluntary stipulations or consent decrees. These stipulations or decrees are usually entered on the basis of budgetary investments and construction plans designed to deal with actual overcrowding and projected increases in inmate population. In many instances, however, the states have been denied modification of a consent decree or been subject to contempt proceedings due to unanticipated inmate increases and unavoidable construction delays that lead to the breach of the underlying decree.[9] In the area

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[8] *Correction Digest*, Vo. 20, No. 19 (Sept. 20, 1989).

[9] *See Bell v. Wolfish*, 441 U.S. 520, 525 (1979) ("unprecedented" increase in pretrial detainees forced double celling); *Rhodes v. Chapman*, 452 U.S. 337, 351 n. 16 (1981)(illustrative case of exarceberation of prison population by "unanticipated increase in the State's prison population [which] compelled the double celling which is at issue"); *Lareau v. Manson*, 651 F.2d 96, 99(2d Cir. 1981)(unanticipated delay in construction of new prison facility have forced Connecticut to exceed rated capacity); *Nelson v. Collins*, 659 F.2d 420, 422-23(4th Cir. 1981)(Maryland sought modification of consent decree with respect to overcrowding due to "large influx of additional prisoners" and "unavoidable delay in completion" of new facilities); *Plyler v. Evatt*, 846 F.2d 208, 210 (4th Cir. 1988)(South Carolina sought permanent modification to consent decree regarding overcrowding due to "unanticipated growth in prison overcrowding"); *Ruiz v. Estelle*,679 F.2d 1115, 1140 (5th Cir. 1982)(Texas sought modifi-

of prison reform litigation, the issue presented in most cases during the 1980's is not the merits of the underlying Eighth Amendment claim, but the review of the compliance efforts by the states.[10] Thus, for all practical purposes, the issue presented in this case is more important for the establishment of a national judicial policy in concordance with the state's efforts to achieve constitutional conditions in prison reform litigation than the underlying Eighth Amendment issue.

The standard adopted in this case by the First Circuit ignores these overriding policy concerns. In institutional reform litigation, stipulations or consent decrees "are not so much peremptory commands to be obeyed in terms, as they are future-oriented plans designed to achieve broad policy objectives in complex, ongoing fact situations." *Plyler*, 846 F.2d at 213. Here the First Circuit focuses on the prisoners'

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cation due to an "unprecedented surge" in prison population which would overburden new facilities under construction); *Duran v. Elrod*, 760 F.2d 756, 758 (7th Cir. 1985)(Court of Appeals vacated denial to modify decree, where Illinois was soon to complete new facilities); *Cody v. Hillard*, 830 F.2d 912 (8th Cir. 1987)(vacating district court ban on double celling) (*Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982)(remedy must weigh cost of compliance and security needs) *Ramos v. Lamm*, 639 F.2d 559 (10th cir. 1980)(development of new prison facilities is extremely relevant in fashioning remedy); *Newman v. Alabama*, 683 F.2d 1312, 1316 (11th Cir. 1982)(Appeals court vacated district court order mandating release of prisoners to comply with consent decree). *Twelve John Does v. District of Columbia*, 861 F.2d 295 (D.C. Cir. 1988)(D.C. sought to modify consent decree due to increase in population); *Inmates of Occoquan v. Barry*, 844 F.2d 828 (D.C. Cir. 1988)(D.C. sought to vacate injunction opposing population cap.).

[10] *Id.*

Eighth Amendment interest in strict compliance with the overcrowding stipulations in disregard of the overall public policy objectives the stipulation embodies. Further, the First Circuit standard discards the interest and good faith of the Commonwealth in fulfilling its public policy objectives by penalizing it with $30,000,000.00 in fines despite having "embarked in an aggressive agenda of new prison construction". *Plyler*, 846 F. 2d at 213.

The following table dramatically demonstrates the objective efforts of the Commonwealth in improving prison conditions. It shows that during the period 1985-1989, the Commonwealth increased the Correctional Administration's budget from $48 million to $169 million; increased penal institutions from 20 to 29; and multiplied prison capacity at 35 sq. ft. from 5,404 to 10,295.

Population, Capacity, Budget and Penal Institutions Commonwealth of Puerto Rico 1980-1989

	1980	*1981*	*1982*	*1983*	*1984*	*1985*
Population[11]	4,139	4,408	4,434	4,631	5,343	5,687
Capacity[12]						
35 sq. ft.	4,313	5,404	5,404	5,404	5,404	5,404
55 sq. ft.	2,846	3,858	3,858	3,858	3,858	3,858
Budget[13]	36	43	41	50	46	48
Institutions[14]	19	20	20	20	20	20

	1986	*1987*	*1988*	*1989*	*1989*
Population	5,992	7,008	8,102	9,697	9,253
Capacity					
35 sq. ft.	5,404	6,866	7,628	10,295	
55 sq. ft.	3,858	5,287	6,226	9,058	
Budget	64	90	104	169	
Institutions	20	24	27	29	

[11] Inmate populations for June 26, 1980; June 26, 1981; June 28, 1982; June 28, 1983; June 28, 1984; June 26, 1985; June 25,1986; June 30, 1987; June 24, 1988; June 28, 1989; Nov. 1, 1989.

[12] Capacities are based on joint measurements taken of institutions in 1986 which resulted in the September 1986 Stipulation and agreed capacities of institutions opened after 1986. Does not include capacities of mental health care facilities (Comunidad Terapéutica and Pabellón Forense).

[13] The Administration of Correction's consolidated budget, in millions, starting with fiscal year 1980-81.

[14] Including halfway houses and Comunidad Terapéutica. Fajardo was added in 1981; Anexo Penitenciaría Estatal (JA), Vega Alta HAS, Proyecto Modelo Rehabilitación and Comunidad Ter-

In essence, the First Circuit's strict approach suffers from the deficiencies identified in *Lareau*, 651 F.2d 96,110 (2d Cir. 1981): it conceals "an unrealistic assessment of the state's ability to comply without releasing inmates into the community." The First Circuit's strict standard fails to consider the potential harm to the public of its consequences. It places the Commonwealth in the position where to avoid payment of huge fines, as indicated by the District Court, "release of inmates appears to be the only form of compliance." *Morales Feliciano*, 672 F. Supp. at 635. Thus, the First Circuit ruling leaves unmitigated the substantial financial pressure on the Commonwealth for the release of inmates, with the attendant "threats to the public safety." *Plyler*, 846 F.2d at 214.

The strict standard adopted by the First Circuit also serves as a strong disincentive to efforts undertaken by the states nationwide to conform their correctional systems to the evolving standards of decency required by the Eighth Amendment. It penalizes the Commonwealth's consensual and cooperative efforts to attend the underlying conditions in concert with other parties and the judiciary. As noted in *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114,1120 (3d Cir. 1979):

> An approach to the modification of a complex affirmative injunction which over-emphasized the interest of finality at the expense of achievability would inevitably make defend-

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apéutica were added in 1987; Anexo Penitenciaría Estatal (Protective), Anexo Guayama and part of Institución Regional del Sur were added in 1988; part of Institución Regional del Sur, Anexo de Bayamón and Centro Detención Regional de Bayamón were added and the old Ponce District Jail closed during 1989.

> ants wary of any decree imposing more than the bare minimum of affirmative obligation. That wariness would, we think, tend to discourage the settlement of injunction actions by consent decree, a high price to pay for the benefits of finality. Even where the decree is litigated, if the power to modify were so closely curtailed the defendants might seek, and the courts might tend to impose, minimum affirmative obligations, perhaps less than realistically achievable, for fear of becoming bound by unreasonable but unchangeable requirements.

CONCLUSION

The issues presented in this case are of great importance to the judicial administration of prison reform litigation across the nation, and therefore merit review by this Court. The litigation of prison conditions under the Eighth Amendment has developed into a cooperative effort between the states and the federal courts to achieve reforms that transcend minimum constitutional standards. The emphasis has shifted from the litigation of liability under the Eighth Amendment to the standards by which the courts are to judge compliance efforts by the states. The crucial and most important task faced by the federal courts today is, therefore, the administration of stipulations and consent decrees. The number of states and federal courts involved and the impact on the whole spectrum of public policy issues like prison administration, crime control, sentencing, the war on drugs and others require that this Court clarify the standards that govern judicial evaluation of state compliance efforts.

The First Circuit's Opinion is in conflict with this Court's decision in *Rhodes v. Chapman*, *supra*. There is also a clear conflict between several circuits that have reviewed district courts' contempt findings against state officials or district courts' refusals to modify consent decrees. In adopting a strict compliance standard the First Circuit opinion threatens to severely disrupt the evolving ground work between the judiciary and the states to address the issue of prison conditions through cooperation and interaction. The dissuasive effect on stipulations and consensual decrees effected by this decision will hinder prison reform, increase litigation costs and exacerbate the already intractable problems faced by the states prison systems. The situation requires the intervention of this Court to clarify the issue and to establish a workable standard for the judicial administration of the states' compliance with stipulations and consent decrees in prison reform litigation. For these reasons, it is respectfully requested that a writ of certiorari be issued.

Respectfully submitted,

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December 26, 1989

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 88-1942

CARLOS MORALES-FELICIANO, *ET AL.*,
Plaintiffs, Appellees,

v.

PAROLE BOARD OF THE COMMONWEALTH OF PUERTO RICO, *ET AL.*,
Defendants, Appellants.

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U.S. DISTRICT COURT
SAN JUAN, P.R.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Juan M. Perez-Gimenez, *U.S. District Judge*]

Before
Breyer and Selya, *Circuit Judges*,
and Caffrey,* *Senior District Judge*.

A. Manuel Martin with whom *Marcos A. Ramirez Lavandero* and *Ramirez & Ramirez* were on brief for appellants.

---

* Of the District of Massachusetts, sitting by designation.

Carlos V. Garcia-Gutierrez with whom *Jose E. Fernandez-Sein* and *Law Offices of Nachman & Fernandez-Sein* were on brief for appellee.

/s/ c: Judge Perez-Gimenez
Ledo. Masini
Local Publications
Appeals' Clerk
9-29-89
L.K.

SEPTEMBER 26, 1989

BREYER, *Circuit Judge*. Officials of the Commonwealth of Puerto Rico, responsible for the Commonwealth's prison system (the "Commonwealth"), appeal two orders that the district court entered in July and August 1988 in a "prison conditions" case, a case which began about 10 years ago and which has involved findings of unconstitutionally poor prison conditions, agreed stipulations about a time table for improvement and the building of considerable new prison capacity. The district court has appointed monitors; it has imposed sanctions designed to produce compliance with the time tables; and, in July and August 1988 it (1) ordered the Ponce District Jail closed and (2) increased the fines imposed as sanctions for failure to meet certain parts of the time table. Initially the Commonwealth appealed from both these orders. By the time of oral argument, it had closed the Ponce District Jail, and it therefore abandoned that portion of the appeal. It continues, however, to press its appeal of the district court's August 1988 order significantly increasing the fines it must pay for each month that it keeps prisoners confined in less than 35 square feet of space per prisoner. Having reviewed the record in this case, we conclude that the district court's order is lawful.

I.

Background

To understand the issues the reader should keep in mind the following key events in this lengthy litigation:

a. *February 1979.* The plaintiffs began their class action complaining of unconstitutional prison conditions.

b. *September 1980.* The district court found that conditions in Puerto Rico's prisons violated the Eighth Amendment's prohibition against cruel and unusual punishment. Among other unlawful features of the system, it found serious overcrowding, with less than 20 square feet of space available for inmates in some prisons. The court entered an order requiring the Commonwealth, among other things, to provide enough additional capacity so that, as a temporary, initial matter, every inmate had at least 35 square feet of space. It also required the Commonwealth to submit plans for providing at least 55 square feet in dormitories and 70 square feet in individual cells on a permanent basis. *See Morales-Feliciano* v. *Romero-Barcelo*, 497 F. Supp. 14, 41 (D. P.R. 1979).

c. *March 1986.* The district court found that the Commonwealth's prisons still did not comply with the Constitution. Citing "lengthy noncompliance [with the court's 1980 order] by defendants," *Morales-Feliciano* v. *Romero-Barcelo*, 672 F. Supp. 591 622 (D. P.R. 1986), the court appointed monitors, who looked into prison conditions and met with the parties.

d. *September 1986 - January 1987.* In September the parties entered into a "stipulation" that the Commonwealth would meet the "35 square foot"

standard by the end of 1986 and the "55 square foot" standard by the end of 1987. The court approved the stipulation in January 1987 and ordered the Commonwealth to comply with its terms.

e. *July 1987.* Although the Commonwealth built additional capacity in 1986 and 1987, prison inmate population rose from 5400 to 7000 (between August 1985 and July 1987). In July 1987, the district court found that the Commonwealth had not met the "35 square foot" standard. It held the Commonwealth in contempt of its September 1980 and January 1987 orders. It assessed a fine of $50,000 for the past failure, and a prospective fine of $10 per day per inmate for each inmate held in excess of a facility's "35 square foot" capacity. (For example, if the Commonwealth held 200 inmates in a facility that could hold 150 giving each prisoner 35 square feet, the fine would be $10 times 50 or $500 per day.) *See Morales-Feliciano* v. *Hernandez-Colon,* 697 F. Supp. 26 (D. P.R. 1987).

f. *July - September 1987.* The Commonwealth, pointing to the still increasing prison population, asked the court to extend the "35 square foot" deadline until November 1987, by which time, the Commonwealth said, it would meet the "35 square foot" standard. In mid-September 1987 the court denied the request. *See Morales-Feliciano* v. *Hernandez-Colon,* 672 F. Supp. 627 (D. P.R. 1987). In late September the court, in another order, increased certain fines (not directly relevant here) and warned the Commonwealth that it was considering "additional sanctions."

g. *April 1988.* The court, after hearing from the monitors and the parties, and taking account of

weather-related construction delays, postponed the "*55 square foot*" deadline from the end of 1987 to the end of 1988.

h. *July 1988.* The district court ordered the Commonwealth to close the Ponce District Jail (where conditions were particularly poor) by the end of 1988. *See Morales-Feliciano* v. *Hernandez-Colon*, 697 F. Supp. 37 (D. P.R. 1988). The Commonwealth initially opposed the order, for it feared its new facilities would not be ready in time. But, by the time of oral argument on this appeal, the new facilities were ready and the Commonwealth has closed the Jail.

i. *August 1988.* The district court, noting that the Commonwealth's prisons still did not meet the "*35 square foot*" standard, increased its "noncompliance" fine from $10 per excess inmate per day to $50 per excess inmate per day. It also provided that the fine rate would increase by $10 per month beginning in September, so that by April 1989 it would amount to $130 per excess inmate per day. If the Commonwealth's Counsel's estimate of 800 to 900 "excess" inmates in April 1989 is correct, the fine for April would have amounted to $3900 per excess inmate or $3,510,000. The Commonwealth appeals from this August order.

II.

Appealability

The plaintiffs, pointing to authority holding that civil contempt orders are ordinarily "interlocutory," that is, not "final," *see* 28 U.S.C. § 1291, "injunctive," *see* 28 U.S.C. § 1292(a)(1), or "collateral," *see Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949), argue that the August order is not appealable. *See Fox* v. *Capital*

Co., 29 U.S. 105, 107 (1936); 11 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2960 at 592 (1973) ("A civil contempt order is interlocutory and, as to a party to the litigation, an appeal is not available until there is a final judgment in the entire action.") Indeed, the plaintiffs add, the August order is not even a finding of "contempt;" rather, it is simply an increase in a sanction related to an earlier finding of contempt (July 1987), and therefore (in plaintiff's view) still less "appealable."

As one court has noted, however, "[e]xceptions to the rule [that civil contempt orders are not final] are plentiful." *Drummond Co.* v. *District 20, UMW*, 598 F.2d 381, 383 (5th Cir. 1979). Those exceptions are all based on the principle that the requirement of finality is to be given a "practical rather than a technical construction," *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. at 546. They reflect a weighing of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) (quoting *Dickenson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)).

In this case, to allow appeal threatens neither the "inconvenience" nor the "costs" associated with "piecemeal review." *Eisen*, 417 U.S. at 171. *See New York Telephone Co.* v. *Communications Workers of America*, 445 F.2d 39, 45 (2d Cir. 1971) (finality determination depends in part on the "risk of disrupting the orderly course of proceedings below"). The appeal does not interrupt a trial on the merits, for any dispute on the merits (either of the constitutional violation or the remedial need to provide more than 35 square feet per prisoner) ended long ago. The district court entered an injunction embodying the "35 square foot" requirement 9 years ago; the Commonwealth stipulated that it would quickly satisfy this requirement more than 2 years ago; there is no reason now to think the Commonwealth will further litigate the merits. Moreover, the issues raised here concern neither the merits of

the underlying constitutional questions nor the legal validity of the "35 foot" requirement. Rather, they concern only compliance. *See Drummond*, 598 F.2d at 384 (contempt order reviewable when only issue on appeal was applicability of injunction to allegedly contemptuous conduct); *New York Telephone*, 445 F.2d at 45 (contempt order reviewable when only issues on appeal were interpretation of restraining order and compliance with that order).

At the same time, to force the Commonwealth to wait for a "final judgment" to appeal the civil contempt order risks "denying justice by delay." *Eisen*, 417 U.S. at 171. We have no reason to believe the court intends to enter a further document called "final judgment," at least not in the near future. And, given the nature of the contempt order, the sums of money that, in theory, might be involved several years from now are so huge, that an appeal at that time would likely prove too late to offer the Commonwealth meaningful relief. *Cf. In Re American Colonial Broadcasting Corp.*, 758 F.2d 794, 803 (1st Cir. 1985) (finality requirement does not apply when irreparable injury may be caused by delaying appellate review until litigation is over).

Thus, we think the civil contempt order in this case resembles those appealable orders where the district court has entered the contempt order after a final judgment and a party has appealed seeking review, not of the legal merits of the basic case, but only of the legal validity of the order of contempt itself. *See Cabrera* v. *Municipality of Bayamon*, 622 F.2d 4, 7 (1st Cir. 1980); *Vincent* v. *Local 294, Int'l Bhd. of Teamsters*, 424 F.2d 124, 128 (2d Cir. 1970); 9 *Moore's Federal Practice* § 110.13[4], at 168 (1989). Although the district court has not entered a judgment called "final," its injunction and later decrees are functionally equivalent to a final determination of the legal merits, for the parties no longer dispute their legal validity and the district court seems unlikely to make any further "final" determination of the merits in the near future.

Since the appealability of a civil contempt order is a matter of practical, rather than formal legal, considerations, *see Cohen*, 337 U.S. at 546, we conclude that the Commonwealth's appeal is legally valid.

III.

The Legal Merits

1. The Commonwealth makes two arguments to back its claim that the district court could not lawfully find it in contempt of the January 1987 order—an order that embodied the Commonwealth's own agreed-upon time schedule for relieving severe prison overcrowding. First, it says that it "substantially complied" with the order, at least in respect to providing each prisoner with at least 35 square feet of space. *See Fortin* v. *Commissioner of Mass. Dep't of Pub. Welfare*, 692 F.2d 790, 797 (1st Cir. 1982) (assuming, but not deciding, that "substantial compliance" is sufficient to avoid contempt); *see also General Signal Corp.* v. *Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986) (using a substantial compliance standard). We note, however, that "substantiality" of compliance depends upon "the nature of the interest at stake and the degree to which noncompliance affects that interest." *Fortin*, 692 F.2d at 795. Here, the interest at issue—the prisoner's Eighth Amendment interest—is "fundamental," *see Robinson* v. *California*, 370 U.S. 660, 666 (1962) (Eighth Amendment is an aspect of Fourteenth Amendment due process); *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937) (Fourteenth Amendment due process includes those "principle[s] of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental"); the relevant harm (confinement in an area smaller than 5 by 7 feet) is significant; the number of prisoners suffering that harm (7 to 10 percent of the prison population) is large; and the time since entry of the remedial decree is long. We cannot say that compliance is so "substantial" as to invalidate the finding of contempt. *See Fortin*, 692 F.2d at 797 (affirming con-

tempt order when district court's finding that compliance was not impossible was not clearly erroneous).

Second, the Commonwealth argues that it has made good faith efforts to comply with the remedial order and the court cannot expect it to do better. The Commonwealth points out that, in recent years, it has dramatically increased spending on prisons. (It spent $115 million in 1977-80; $179 million in 1981-84; and $306 million in 1985-88). It has also built far more prison capacity. But, it adds, the growth of prison population from 5400 in August 1985 to 8300 by September 1988 (and to 9200 by April 1989), along with certain weather-related construction delays (which led the district court to postpone the "55 square foot" compliance data), means that overcrowding still exists.

"Good faith" efforts, however, do not automatically constitute a sufficient legal excuse for failing to carry out the district court's order. *Fortin*, 692 F.2d at 796-97 ("Good faith alone is not a defense to civil contempt. . . . [I]mpossibility would be a defense to contempt, . . . [but] the test of impossibility may be particularly strict [where] the needs of [the plaintiffs] are urgent.") (citations omitted). *See McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) ("The absence of wilfulness does not relieve from civil contempt."); *see also United States* v. *Bryan*, 339 U.S. 323, 330 (1950) (contemnor can defend against contempt charges "by proving that he is unable to comply"). The Commonwealth has explained why compliance became more difficult than it initially anticipated. But it has not shown that causes beyond its control have made it overwhelmingly difficult or anywhere near impossible to give each prisoner 35 square feet of space. The Commonwealth has had considerable time to meet its self-imposed deadline, whether one counts from September 1986, when it agreed to the deadline, or from November 1987, its own proposed "postponement" date (which the court rejected). The percentage of prisoners still housed in less than 35

square feet is modest; it is not clear why the Commonwealth could not provide at least temporary space of sufficient size while it builds permanent extra capacity. Of course, building extra space is expensive, but budgetary constraints ordinarily do not, in and of themselves, provide a legal excuse for noncompliance. *Cf. Lareau* v. *Manson*, 651 F.2d 96, 104 (2d Cir. 1981) (state's interest in spending less money on prisons cannot excuse overcrowding).

The Commonwealth points to *Nelson* v. *Collins*, 659 F.2d 420 (4th Cir. 1981) as authority for the proposition that a circuit court will reverse a contempt finding when a state has exercised "reasonable diligence" in complying with a district court's "prison overcrowding" decree. But in *Nelson*, the district court premised its contempt finding on continued overcrowding caused in part by the court's own refusal to allow the state to "double-cell" some prisoners in another prison. The Fourth Circuit reversed this later finding, permitting the double-celling, thereby eliminating the overcrowding, and consequently eliminating the contempt. *See Nelson*, 659 F.2d at 429. Here, the Commonwealth continues to maintain conditions in which significant numbers of prisoners are held in less than 35 square feet of space.

In sum, we believe the district court could find that it was within the Commonwealth's power to comply with its own "35 square foot" timetable. That being so, and given the extent to which the prison system remained out of compliance, we believe the district court could find, in August 1988, that the Commonwealth had failed to meet the court's (and its own) time schedule; that it remained in contempt; and that further monetary sanctions were appropriate.

2. The Commonwealth also argues that the amount of the sanction assessed (initially $50 per excess prisoner per day, with a rate increase of $10 per month) is unreasonably, and hence unlawfully, high. Since the purpose of the

sanction in this case is to induce compliance with the court order, its reasonableness depends upon "the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *United States* v. *UMW*, 330 U.S. 258, 304 (1947). The law permits the district court considerable leeway in making this assessment. *Cabrera* v. *Municipality of Bayamon*, 622 F.2d at 7. Several factors, taken together, lead us to conclude that the fine, though high, is lawful.

First, the threatened harm (providing less than 35 square feet per inmate) is serious, particularly in the context of the prison conditions that originally led to this lawsuit, *see Morales-Feliciano* v. *Romero-Barcelo*, 497 F. Supp. at 20-33 (finding a variety of conditions which exacerbated overcrowding). *Cf. id.* at 35 (citing 75 square feet minimum set by the American Correctional Institute); National Sheriffs Ass'n Handbook on Jail Architecture (1975) (70-80 square feet minimum for single occupancy rooms); National Sheriffs Ass'n Manual on Jail Administration (1970) (55 square feet minimum per occupant for multiple occupant cells); Report of the Special Civilian Committee for the study of the United States Army Confinement System (1970) (55 square feet minimum adopted by the Army). *But of, Rhodes* v. *Chapman*, 452 U.S. 337, 348 n.13 (1981) (expert opinions are "helpful and relevant" but do not suffice to establish contemporary standards of decency). Second, as of August 1988, a significant number of prisoners (estimated at 600 to 700) were held under these conditions. Third, the Commonwealth itself stipulated that it would meet the minimal 35 square foot standard by December of 1986, and then argued that, in any event, it could meet it by November of 1987. Fourth, the delays in meeting the standard have been many and serious. They have led the district court to impose sanctions, and then to warn of serious further sanctions. Fifth, the Commonwealth has not demonstrated any special reason that would

lead us to think it cannot meet the "35 square foot" standard. Sixth, the fines, though steep, are geared to the extent of noncompliance, and they should diminish rapidly as the Commonwealth builds additional space or employs temporary alternatives. Seventh, the fine money has been deposited in an interest-bearing account, and the district court may decide to use it to help defray relevant costs.

3. The Commonwealth argues that the court issued its August order without the prior hearing that the law requires. *See Washington Metro. Area Transit Auth.* v. *Amalgamated Transit Union, Nat. Capital Local Div. 689*, 531 F.2d 617, 620 (D.C. Cir. 1976) (civil contemnors who assert a genuine issue of material fact have a right to a full, impartial hearing); *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook R.R. Co.*, 380 F.2d 570, 578 (D.C. Cir.) (same), *cert. denied*, 389 U.S. 327 (1967). We have held before, in analogous circumstances, "that in certain settings a matter can adequately be 'heard' on the papers . . . . [if] given the nature and circumstances of the case, . . . the parties ha[d] a fair opportunity to present relevant facts and arguments to the court, and to counter the opponent's submissions[.]" *Aoude* v. *Mobil Oil Corp.*, 862 F.2d 890, 894 (1st Cir. 1988) (citation omitted) (discussing necessity for hearing on preliminary injunction). This case passes the *Aoude* test. The Commonwealth had adequate notice and an opportunity to present evidence and arguments in writing. The Commonwealth points to no disputed factual matters that required an *oral* proceeding. Nor does it claim that it asked the court for such a hearing. Thus we can find no violation of any legal right. *See Commodity Futures Trading Comm'n* v. *Premex, Inc.*, 655 F.2d 779, 782 n.2 (7th Cir. 1981) (due process does not require evidentiary hearing when documentary evidence was sufficient to establish contempt and defendants failed to demand a hearing or assert any material issue of fact). *Cf. Yates* v. *United States*, 316 F.2d 718, 725

(10th Cir. 1963) (right to have a plenary hearing on criminal contempt charges can be waived).

(We add that if the recent hurricane has created new, serious problems, the Commonwealth is free to call those problems to the attention of the district court.)

For these reasons the August 1988 order of the district court is

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Civil Case No. 79-4 (PG)

CARLOS MORALES FELICIANO, *et al.*,
Plaintiffs,

vs.

RAFAEL HERNANDEZ COLON, *et al.*,
Defendants.

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SAN JUAN, P.R.

MEMORANDUM OPINION AND ORDER

Pending before the Court is plaintiffs' *Motion to Increase the Fines for Violation of the Stipulation and Order Entered Thereon Relating to Population Caps* filed on July 11, 1988. On July 13, 1988, plaintiffs' supplemented their motion by a pleading entitled *Supplement to Motion to Increase the Fines and Apply Them on the Basis of Each Inmate Whose Right is Being Violated.* Defendants have filed a pleading in opposition to the motion, and plaintiffs have replied to that pleading.

Plaintiffs' seek to increase the current fine from $10.00 per prisoner to $50.00 per prisoner and to apply the fine to "each inmate who is constitutionally adversely affected by a violation of the living space capacity of our (*sic*)

dormitory or cellblock." *Plaintiffs' Motion*, p. 6. The effect of plaintiffs' request can be demonstrated by the following example. If the maximum capacity of a dormitory has been set at 20 prisoners, and if 21 prisoners are assigned to that dormitory, a fine of $1,050 ($50 x 21 prisoners) would be levied.

Defendants' opposition to the motion is based on asserted progress in reducing crowding in the face of increased systemwide population. In particular, defendants point to the fact that only two institutions, Vega Alta and the State Penitentiary have failed to meet the 35 square feet standard in recent months. Defendants also argue that their efforts to construct additional facilities should be taken into account.

For the reasons set forth in the remainder of this opinion and order, the Court will increase the amount of the fine, but will continue to apply the sanction only for those prisoners housed in excess of the maximum capacity established by the Court's earlier orders. The decision to increase the amount of the fine is fully justified by the history of the Court's efforts to address extreme overcrowding throughout the prison system of Puerto Rico.

It should be remembered that the Court first ordered that each prisoner be afforded 35 square feet of living and sleeping space *on a temporary basis* in an opinion and order entered on September 5, 1980! *Morales Feliciano v. Romero Barcelo*, 497 F.Supp. 14 (D.P.R. 1980). That objective not having been achieved at the time the Court appointed a monitor in May 1986, the defendants finally undertook to provide 35 square feet of living and sleeping space to each prisoner by stipulation entered into on September 8, 1986. This objective was to be achieved no later than January 1, 1987. The stipulation was provisionally approved by the Court on September 26, 1986, and was finally approved on January 26, 1987, 26 days after the

deadline set by the stipulation for the achievement of the 35 square feet standard.

On March 26, 1987, plaintiffs filed their *Motion for an Order to Show Cause Why Defendants Should Not be Found in Contempt of Court and Appropriate Fines Imposed.* Defendants opposed the motion, and a hearing was held on May 27, 1987. On July 23, 1987, the Court entered an opinion and order making findings of fact and setting forth conclusions of law. The defendants were found to be in civil contempt and were directed to pay a one time sanction in the amount of $50,000 for past noncompliance and to pay a prospective daily fine of $10.00 per day for each inmate held in an institution or a housing unit in excess of the stipulated maximimum capacity.

Since the date of the Court's order defendants have been required to pay $1,126,310 in fines. Nonetheless, as plaintiffs' motion to increase the fines makes clear, the effect of the coercive actions taken by the Court to date has not been compliance. Indeed, defendants concede this central fact. Of greatest concern to the Court is the fact that defendants almost achieved compliance at the beginning of 1988, when the lowest weekly fine of $280 was levied. Shortly thereafter, however, the amount of weekly fines began to increase, and the most recent report of the Court Monitor for the 14 day period commencing July 8 and ending July 21, 1988, resulted in sanctions in the amount of $84,460.00.

The Court will not repeat at length the legal analysis or the conclusions of law set forth in its order of July 23, 1987, which first imposed sanctions against defendants. Suffice it to say that the fact that the problem of extreme overcrowding has been confined to two institutions is irrelevant. One of these is the State Penitentiary, Puerto Rico's largest institution, which holds pre-trial prisoners. On June 28, 1988, the capacity was 1638, or 146.25% of

the maximum capacity of 1120.[1] The other is Vega Alta, the largest institution in Puerto Rico for female prisoners. On June 28, 1988, the population was 266, or 132.68% of the institution's maximum capacity of 201.[2] The Court's earlier tours of these institutions provide a basis for an unequivocal finding that living conditions in these two institutions are inhumane and intolerable under these circumstances.[3]

Although defendants plead that they are "unable" to comply, they provide no factual basis for a finding to this effect. For example, they do not even allege that all reasonable steps have been taken to control the population level or that any efforts have been made to provide temporary housing for those prisoners who cannot be afforded 35 square feet of living and sleeping space in existing institutions. Although efforts have been made to increase permanent bed space to achieve the 55 square feet standard, defendants offer no excuse for the failure to provide 35 square feet of living and sleeping space per prisoner.[4]

As the Court stated in its July 23, 1987 order,

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[1] It should be remembered that this maximum capacity is based on the provision of only 35 square feet per prisoner.

[2] *Id.*

[3] It should be noted that defendants agreed on September 8, 1986 to provide 55 square feet of living and sleeping space to each prisoner in the system no later than January 1, 1988. The Court has extended this deadline until January 1, 1989. What is at issue now is the provision of only 35 square feet per prisoner, less space than the Court has found to be required to meet minimum constitutional standards.

[4] In a recent hearing involving the prison at Ponce, plaintiffs introduced, without objection, an exhibit indicating that the Governor of Puerto Rico, a defendant in this action "preferred" to pay fines than to "compromise the public's safety" by obeying the Court's order. Pl. Ex. 68. Such distorted rhetoric, particularly in view of the fact that the Court seeks only to enforce a stipulation to which defendants agreed, is unseemly. Moreover, it tends to undercut defendants' argument that compliance is beyond their control.

> (t)he Court applauds whatever advances have been achieved by the Administration. However, we cannot condone any further the perpetration of constitutional violation in open disregard to the Court's order and to defendants' own compromise to comply. The situation has continued for too long. The waiting time is over.

Based on the authorities and reasoning set forth in that order, the Court finds that defendants have fallen far short of meeting their burden to demonstrate clearly and categorically that they are unable to comply with the maximum capacities established by stipulation and the Court's earlier order.

Civil contempt is remedial in nature and, in this instance, is designed to coerce compliance with the Court's order. *See, United States v. United Mine Workers of America*, 330 U.S. 258 (1947). This purpose has been recognized by the Court of Appeals for the First Circuit. *In re Martha R. Kave*, 760 F.2d 343 (C.A. 1st Cir. 1985); *G. & C. Merriam Co. v. Webster Dictionary Co.*, 639 F.2d 29 (C.A. 1st Cir. 1980). When, as in the instant case, the fine imposed proves to be insufficient to prod defendants into compliance, the fine may be increased. *State of New York v. Shore Realty Corp.*, 763 F.2d 49, 54 (C.A. 2d. Cir. 1985).

In view of defendants' failure to abide by the maximum capacities for more than one year following the Court's original imposition of sanctions, and the absence of legal excuse for such noncompliance, any failure by the Court's to increase the sanction in an effort to achieve the objective of its original order would be tantamount to abdication of its judicial function. Were the increased fine to be applied to all prisoners "affected" by overcrowding, however, as requested by plaintiffs, the amount of the daily fine would be staggering. Perhaps, eventually, the Court will have no choice but to adopt such a draconian measure. At the present time, however, the Court will continue to as-

sess a fine, and one that will increase automatically if defendants fail to obey the order, but only with respect to prisoners held in excess of maximum housing unit or institutional capacities established by prior order.

WHEREFORE, the Court being fully apprised in the premises and for good cause shown, it is hereby

ORDERED that, commencing on the date of this order, defendants shall pay as sanctions a daily fine of $50.00 per inmate for any prisoner held at any institution in violation of the maximum capacity of the housing unit to which he is assigned, or in violation of the maximum capacity of the institution. It is further

ORDERED that, should defendants fail to achieve compliance by September 1, 1988, the fine shall increase to $60.00 per inmate, and shall continue to increase by $10.00 per inmate on the first day of each succeeding month until compliance is achieved.

IT IS SO ORDERED this 15th day of August 1988, in San Juan, Puerto Rico.

/s/ Juan M. Perez-Giminez
Juan M. Perez-Gimenez
Chief Judge

APPENDIX C

United States District Court,
D. Puerto Rico.

Civ. A. No. 79-4 (PG).

Carlos MORALES FELICIANO, *et al.*,
Plaintiffs,

v.

Rafael HERNANDEZ COLON, *et al.*,
Defendants.

Sept. 14, 1987.

Puerto Rican prison authorities moved to modify stipulation and order that they provide each prisoner with at least 35 square feet of living space. The District court, Perez-Gimenez, Chief Judge, held that: (1) prison authorities were not entitled to relief under subsection of federal rule allowing modification on ground that changed circumstances would make further compliance with order unjust; (2) prison authorities failed to show that compliance would result in pernicious consequences, and failed to show changed circumstances warranting relief; and (3) building project undertaken to increase dramatically available beds for housing did not entitle prison authorities to relief.

Motion denied.

See also, 672 F.Supp. 591.

OPINION AND ORDER

PEREZ-GIMENEZ, Chief Judge.

Pending before the Court is the defendants' Motion to Modify the Stipulation on Crowding. That pleading in fact seeks modification of the order of this Court, dated January 26, 1987, approving and adopting as an order of the Court, a stipulation of the parties, filed September 8, 1986. The defendants' motion seeks relief under Rule 60(b) of the Federal Rules of Civil Procedure, specifically under subsections (5) and (6).

Section I of the order will discuss the background of the present motion. Section II will discuss the standards applicable to motions to modify injunctions. Section III will evaluate defendants' modification request in light of the applicable standards.

I. BACKGROUND

Since the inception of this litigation, over eight years ago, the issue of crowding in the penal institutions of Puerto Rico has been pervasive. The Court's first substantive decree, issued on September 5, 1980, addressed this issue by directing defendants to provide each person in the custody of the Administration of Correction with at least 35 square feet of living space.[1] Five and a half years after that decree, the Court entered its Memorandum Opinion and Order, finding fundamental constitutional violations in the operation of the Puerto Rican prison system. At the heart of that finding was the problem of

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[1] Critically, this minimum mandate was a *temporary* measure designed to provide inmates immediately with a modicum of decency in their habitations while incarcerated. The September 5 order requires, ultimately, that inmates housed in cells be provided with at least 70 square feet of living space and that inmates in dormitories be afforded at least 55 square feet of living space. Plans to accomplish these graduated objectives were to be filed with the Court within 90 days of the order. *Feliciano v. Barceló*, 497 F.Supp. 14 (D.P.R.1980).

crowding. The simple staggering numbers of inmates, crowded in facilities already sorely taxed by age and neglect, create a core of constitutional deprivation, from which radiate related problems of deplorable hygiene, rampant violence, disregarded illness, pervasive idleness and arbitrary discipline. The Memorandum Opinion and Order of March 23, 1986, revisited the issue of crowding in light of evidence made known to the Court by a variety of means set out in the opinion. The Court was dismayed to learn how little had been done to ameliorate the crowded conditions that had been condemned a half-decade earlier; indeed, the numbers of inmates, housed typically in the same aging facilities, had grown greatly, far outstripping the modest new construction and renovation undertaken in the intervening time. That this situation was intolerable, and would not be tolerated by the Court, could not have escaped the attention of defendants after issuance of the March 23 order.

At the time of that order, the Court appointed two monitors to assist in evaluating the conditions in the prisons of Puerto Rico, and to participate in the development of a comprehensive remedial plan to alleviate unconstitutional conditions. The first formal act of the monitors, undertaken with the Court's express approval, was to convene negotiations designed to address the fundamental problem of crowding in the penal facilities of Puerto Rico.[2] Those negotiations consumed a considerable period of time, as they required, among other things, the compilation of accurate information about the size of housing units in all of the institutions, a process that proved to be difficult and protracted.

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[2] At the time of these negotiations plaintiffs' motion seeking a finding of contempt against defendants, alleging violations of the Court's September 4, 1980, order on crowding, was pending before the Court. As part of the stipulation plaintiffs agreed to withdraw that motion.

On September 8, 1986, over six years after the Court's initial decree on living space, the parties signed a stipulation on the crowding issue. The stipulation establishes population limits for each penal institution in Puerto Rico, and also requires that inmates be provided a minimum amount of living space. The provision of living space for inmates is to be accomplished in a phased manner; the only standard in the stipulation at issue in the pending motion is the requirement that as of December 31, 1986, defendants provide a minimum of 35 square feet of personal living space for inmates.[3]

The Stipulation was provisionally approved by the Court on September 26, 1986, and finally approved by an order filed on January 26, 1987, after appropriate proceedings pursuant to Rule 23 of the Federal Rules of Civil Procedure. The Court's order approving the stipulation directed that it be implemented immediately, thereby transforming the stipulation into an order of this Court, with full binding effect on the parties.

On February 27, 1987, the monitors filed their *Second Report*, evaluating defendants' state of compliance with the provisions of the Court's order on crowding. The report reflected the state of affairs in Puerto Rico's prisons as of January 26-30, 1987. The report was approved, and its findings adopted, by the Court on March 27, 1987, without objection by any party. In brief, the report documented significant noncompliance with the substantive provisions of the stipulation on crowding, including institutional populations in excess of those permitted by the stipulation, and maldistribution of population within institutions, combining to deprive individuals housed in certain housing units

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[3] Of course, to the extent defendants seek a nine-month extension of the time at which they are required to provide 35 square feet of living space per inmate, extension of the subsequent deadline for provision of 55 square feet seems inevitable although the matter is not addressed in the current motion.

of the 35 square feet of living space to which they are entitled under the terms of the Stipulation.

After the *Second Report of the Monitors* was filed, plaintiffs filed a Motion for Contempt. The motion alleged fundamental and pervasive noncompliance with the terms of the stipulation, beginning with its first effective date and continuing until the date of filing of the motion. Plaintiffs' motion sought a finding of contempt and the imposition of civil sanctions.

The Court convened a hearing on the plaintiffs' motion on May 27, 1987, at which testimony was adduced relating to the facts of compliance, and the circumstances surrounding development and implementaion of the stipulation.[4] On July 23, 1987, the Court issued its Opinion and Order adjudicating plaintiffs' motion for contempt. The Opinion and Order first reviewed the procedural background of the contempt proceeding and summarized the evidence presented at the hearing. After these preliminary matters, Findings of Fact and Conclusions of Law were set forth, supporting the judgment of the Court that defendants were in contempt of the Court's order on crowding. As a consequence of that judgment, and in order to promote future compliance with the Court's orders, a sanction in the amount of $50,000 was imposed; further, a prospective daily sanction of $10 per inmate was imposed, to be paid whenever the terms of the stipulation concerning maximum institutional capacity or individual living space are violated.

The July 23 order was not appealed from. Rather, after plaintiffs' motion for contempt was adjudicated, defendants had been found in contempt, and a sanction had been imposed, defendants moved for relief from the underlying

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[4] The testimony adduced at the hearing is described in detail in the Court's Opinion and Order of July 23, 1987, and need not be recounted here.

obligation to provide 35 square feet of living space for inmates housed in the penal institutions of Puerto Rico.[5] The facts alleged in defendants' brief in support of their motion for relief essentially summarize the testimony of Dra. Otero de Ramos, the Administrator of Correction, which was the primary evidence offered by the defendants during the May hearing in defense of the charge of contempt.[6]

II. STANDARDS FOR MODIFICATION

Rule 60(b) of Federal Rules of Civil Procedure governs the modification of decrees and relief from judgment. Rule 60(b) provides, in pertinent part, as follows:

> On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (5) it is no longer equitable that the judgment have prospective application;
>
> (6) any other reason justifying relief from the operation of the judgment.

Defendants' motion apparently seeks relief under both subsections of the rule. At the outset, then, the rule should

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[5] The present case thus is far different from that reviewed in *Newman v. Graddick*, 740 F.2d 1513 (11th Cir.1984), where the court held that a district court, faced with simultaneous motions for contempt and modification, should resolve the modification issues before assessing defendants' compliance with, and possible contempt of, the decree.

[6] Indeed, the factual matters alleged in defendants' motion all relate to developments that occurred before the May hearing, and therefore, are addressed in the evidentiary record of that hearing, making the compilation of additional evidence unnecessary. In fact, defendants have not sought an evidentiary hearing for their motion. The Court has concluded, therefore, that it can resolve the pending motion without an evidentiary hearing. A certain number of the findings of fact made by the Court in its July 23 order are directly material and will be noted; additional findings will be made herein.

be analyzed to determine the standard to be applied to defendants' motion.

A. *Modification Generally*

Modification of an injunctive decree is extraordinary relief, and parties seeking such relief have a formidable burden in establishing that equitable concerns warrant modification. *United States Steel Corp. v. Fraternal Association of Steel Haulers*, 601 F.2d 1269, 1274 (3rd Cir. 1979); *V.T.A. v. Airco*, 597 F.2d 220, 224 (10th Cir.1979). It is, of course, proper that modification should be exceptional rather than routine, as any attempt to alter the terms of a binding injunctive decree implicates the elemental concerns of finality, the legitimate expectations of the parties and the preservation of judicial resources. As expressed by the United States Supreme Court, "firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and laws and neither the plaintiff nor the court should be subjected to the unnecessary burden of reestablishing what has once been decided." *System Federation No. 91 v. Wright*, 364 U.S. 642, 647, 81 S.Ct. 368, 371, 5 L.Ed.2d 349 (1961). This concern is no less valid when the injunction in question was entered by consent, since it is beyond question that consent decrees are judicial acts, as well as contracts, and are entitled to the same finality and deference as orders entered following constested litigation. *United States v. Swift & Co.*, 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932). "There must be an end to litigation some day, and free, calculated and deliberate choices are not to be relieved from" *Ackerman v. United States*, 340 U.S. 193, 198, 71 S.Ct. 209, 211, 95 L.Ed. 207 (1950).

Of course, the present case presents an interesting hybrid of these issues since the obligation to provide 35 square feet of living space per inmate is, within this litigation, derived from both an injunction following a hear-

ing (the September 1980 order)[7] and an order adopting an agreed decree (the September 1986 stipulation and order). In any event, the relief sought by defendants is extraordinary, and the showing they must make to obtain the relief is imposing.

B. *Subsection (5)*

Subsection (5) of Rule 60(b) embodies the long-standing common law doctrine that permits modification of equitable decrees when three requirements are met:[8]

a) the decree has been in place for a considerable period of time;

b) compliance has been achieved and maintained for long enough to diminish the threat of further dereliction; and

c) prospective application of the decree would work an injustice. This three-prong test embodies the fundamental rule governing modification of consent decrees that was announced a half-century ago by the United States Supreme Court. In *United States v. Swift & Company*, 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932), the Court reviewed a lower court's refusal to modify a consent judgment, several years after its entry and, it is worth noting, after defendants had established a course of compliance. The basic claim of defendants in *Swift* was that the decree should be modified to account for intervening changes in the market structure. Because of the controlling nature of the *Swift* standard as it relates to subsection (5), the opinion will be discussed at some length.

First, the Court observed the historic power of an equity court to modify its orders:

> We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed con-

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[7] No appeal was taken from this judgment.

[8] Rule 60(b) codified the common law doctrines relating to modification of, and relief from, judgments.

> ditions though it was entered by consent. . . . A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.

286 U.S. at 114, 52 S.Ct. at 462. After acknowledging the possibility that some decrees might of necessity be provisional, in that they involve changing conduct and conditions, the court enunciated the standard that should be applied on the facts before it. Two formulations are set out, and they are essentially the same:

> a) [a] court must not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong;

Id. at 115, 52 S.Ct. at 462; and, in a lengthier and more revealing passage,

> b) [t]he injury for us is whether the changes are so important that dangers, once substantial, have become atenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying they are the victim of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

Id. at 119, 52 S.Ct. at 464.[9] *See, Fortin v. Commissioner of Mass. Dept. of Public Welfare*, 692 F.2d 790, 799 (1st Cir.1982).

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[9] The final intonation of the holding—the consensual nature of the judgment—was a notable part of the Court's entire opinion. For example, in response to the argument that market dislocations had arisen since entry of the consent decree that was the subject of the modifi-

[1] In summary, then, it may be said that subsection (5) relates to situations in which a party seeks to modify a decree, after a sustained course of compliance, on the ground that changed circumstances make further application for the decree unjust. Reduced to those terms, it is apparent that defendants are not in a position to seek relief under subsection (5). The decree has, as yet, had *no* application, in that it has never been complied with. Moreover, nothing has changed since entry of the decree to make its application unjust, or to transform it into "an instrument of wrong." The requirement that defendants provide 35 square feet of living space for inmates remains just, to say the least, and prospective application of the decree is fitting and proper. Any changes in circumstance averred by defendants relate only to their misapprehension of facts extant at the time the stipulation was assigned. That situation is not cognizable as changed circumstances within the meaning of *Swift*.

C. *Subsection (6)*

Thus, if at all, defendants are entitled to seek modification under subsection (6). As a practical matter, the content of subsection (6) must be construed as a residual exception, embodying any historic equitable ground for modification not otherwise specified in the specific grounds set out in subsection (1) through (5).

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cation motion, the Court noted

> The difficulty of ferreting out these evils and repressing them when discovered supplies an additional reason why we should leave the defendants where we find them, especially since the place where we find them is the one where they agreed to be. 286 U.S. at 119, 52 S.Ct. at 464.

The rationale applies at least as strongly to the present case, where the defendants have been under the primary obligation concerning provision of adequate living space for six years. The difficulty of projecting rates of growth in an inmate population provides a powerful reason for not allowing the obligation of defendants to provide minimally adequate habitation to shift with the prevailing prediction.

Although because of its facts *Swift* is predominantly a case iluminating the common law origin of subsection (5), the Supreme Court's opinion observes that equitable relief might be entered in cases of markedly different character. The Court defined the distinction as being

> between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.

Id. The effect of this distinction on the standard to be applied in the event modification is sought is not set out in the *Swift* opinion. It has been articulated, however, by courts of appeals, in reviewing requests for modification of complex and organic injunctions such as those involved in institutional litigation.

These requests arise in factual contexts different from that present in *Swift* in two primary respects. First, rather than a prolonged course of compliance, defendants seek modification at a time of significant noncompliance; second, rather than asserting that prospective application is unjust by virtue of changed conditions, defendants suggest that the decree, if applied, will not accomplish the objective sought. The latter contention is essential in seeking modification of injunctions, in light of the clear doctrine that "a decree may not be changed in the interests of defendants if the purposes of the litigation have not been fully achieved." *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248, 88 S.Ct. 1496, 1499, 20 L.Ed.2d 562 (1968).

The leading discussions of the standard to be applied in the "provisional" setting envisioned in *Swift* are *Duran v. Elrod*, 713 F.2d 292 (7th Cir.1983) and *New York State Association v. Carey*, 706 F.2d 956 (2nd Cir.1981); *see also, Mayberry v. Maroney*, 558 F.2d 1159 (3rd Cir.1977). Ultimately, the decisions evaluating requests for modification

in institutional reform litigation place heavy reliance on the "changed circumstances" and "grievous wrong" language of *Swift*. Nonetheless, because of the difference in underlying facts, the cases merit discussion apart from the basic holding in *Swift*.

Particularly instructive here is the decision in *Duran v. Elrod*, where the Court of Appeals reviewed, and affirmed, a district court's refusal to modify the provisions of a consent decree relating to crowding at a detention facility. The defendants sought modification on the ground that unexpected population increases had complicated the task of complying with the crowding provisions they had agreed to.

The court noted first the "extraordinary" nature of rule 60(b) relief, and the requirement that "a significant change of circumstance shall have occurred since the date of the final judgment to warrant its modification." 713 F.2d at 296, *quoting, Benjamin v. Malcolm*, 528 F.Supp. 925, 928 (S.D.N.Y. 1981).[10] Defendants failed to make this showing, even though they were able to establish unforeseen population increases. The court concluded

> [t]the County officials made a free, deliberate choice when it [sic] agreed to settle this dispute and terminate the long costly litigation. The parties engaged in arms-length bargaining and the detainees have a justified expectation that the bargain freely entered will be honored.

Id. at 296-97.

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[10] The opinion in *Duran v. Elrod* traces this standard to the "grievous wrong" language in *Swift*. This lineage establishes that parties seeking modification must show a significant change in circumstances, warranting modification, whether the decree at issue is entered in a fixed or an organic context as those situations are delineated in the *Swift* opinion.

In *New York State Association v. Carey (Willowbrook)*, 706 F.2d 956 (2nd Cir.1981), defendants sought to modify an order relating to the depopulation of an unconstitutional mental health facility. The court's order originally limited the size of alternative facilities that could be used to house inmates released from Willowbrook. Defendants' motion conceded the validity of the underlying objective—depopulation of Willowbrook—and argued that the injunction in fact hindered accomplishment of the objective by limiting the use of alternative facilities. Thus, at issue was only the matter of how best to accomplish depopulation. In this context, the court noted that the particular demands of institutional reform litigation, and the dynamic character of the reform project, require that modification be granted "with a rather freer hand." *Id.* at 970. Yet, the greater freedom of modification in this situation serves only the end of perfecting or improving the mandated route to the underlying objective. As the court in *Carey* noted, changes should be viewed more freely, provided the change "would not derogate from the primary objective of the decree." 706 F.2d at 969.[11]

D. *Conclusion*

The analysis set out above yields the following principles:

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[11] In *Fortin v. Commissioner of Mass. Dept. of Public Welfare*, 692 F.2d 790 (1st Cir.1982), the Court of Appeals for the First Circuit affirmed a denial of defendants' motion to modify, which motion was based on an alleged "change of law" since entry of the consent decree. After reviewing the facts and rejecting the claim of "change of law" the court assessed the line of cases that permit modification under the more flexible standard applicable to supervision of changing conduct. As summarized by the *Fortin* court, "the rationale of these cases is that when the relevant facts turn out to be different than supposed at the start, the decree may be altered to produce the originally intended result." 692 F.2d at 800. In *Fortin*, the defendants were unable to make that showing, and so modification was denied, even under the more flexible standard.

1) defendants bear the burden of establishing that they are entitled to modification;

2) to meet this burden, defendants must demonstrate that, by virtue of changed circumstances, the decree as written will not accomplish the underlying objectives;

3) defendants must show, as well, that the changes sought will not detract from the basic objective, here the provision of minimally adequate living space for inmates.

Defendants' request to modify the Court's order on crowding will be reviewed in light of these standards.[12]

III. DEFENDANTS' REQUEST FOR MODIFICATION

The considerations advanced in support of their claim for relief are denominated by defendants, in the sub-headings of their motion, as "unforeseen population increase", "substantial compliance", "1987 construction program" and "consequences". The foregoing analysis of the standards for modification should make it apparent that "substantial compliance" and the scope of the current construction program are not generally cognizable as grounds for modification. Therefore, primary attention will be addressed to two following separate but related issues: (1) changed circumstances relating to the rate of increase in the inmate

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[12] Impossibility is also a basis for modification. In other words, if the terms of an injunction are impossible to meet, defendants are entitled to have the decree modified. The claim of impossibility in this context is one of *permanent* impossibility, and thus, is far different from a claim of *temporal* impossibility alleging that a particular deadline cannot be met. Such a claim is not a basis for modification although it may serve as a defense to contempt. In other words, if defendants suggest that the December date for provision of 35 square feet was impossible to achieve because of temporal miscalculation, that argument might stand as a defense to contempt. In the current case, of course, evidence on that point has been received and carefully considered, and it was rejected as a defense in the present case. Even were such a defense of temporal impossibility established, however, it would still not warrant modification of the decree.

population; and (2) the potential adverse consequences that might arise from compliance with the mandate as written. Following that discussion, the extent of compliance and the scope of the efforts thus far to comply will be addressed.

Defendants offer factual assertions to support the claim of changed circumstances, and those assertions warrant discussion. The second ground, relating to consequences, can be discussed simply and will not require a detailed review of the evidence; accordingly, it will be discussed first.

A. *Consequences*

[2] The core of the argument concerning pernicious consequences is that if defendants are required strictly to comply with the terms of the stipulation, they will be forced to loose on the community large numbers of prisoners not qualified for such release, thereby endangering the community and hindering the Commonwealth's attempt to curb crime. With regard to the latter point, defendants suggest that considerations of comity and commonwealth/federal relations are implicated.

First, the factual basis for this position is dubious. It relies on the assertion that all persons presently incarcerated in Puerto Rico would present a danger to the community if released. That assertion is confuted by the testimony of Dra. Otero that the Correction Administration has insufficient halfway houses and other alternatives to confinement to handle inmates eligible for such assignments or diversion.

Second, the argument has an undertone of disingenuity, since defendants have known for six years that they are obligated to provide minimally adequate living space for inmates, and have, throughout, been delinquent in doing so. Now, having been punished, for the first time, for not meeting their obligations, they invoke the spectre of re-

lease of inmates. Of course, the civil contempt remedy imposed in this case is not a directive for release, such as that reviewed in *Newman v. Graddick*, 740 F.2d 1513 (11th Cir.1984). Indeed, the remedy here is the precisely approved remedy, one that permits defendants to choose their fate: either comply, or be sanctioned—the option remains with defendants, as does the choice of means of achieving compliance. Defendants' recalcitrance has brought them to the point where, in the short run, release of inmates appears to be the only means of compliance. Had they not ignored other means of controlling the operation of the criminal justice system and the rate of incarceration, their options would have been more bountiful.

Finally, as for the effect of compliance on the sovereignty of the Commonwealth and the integrity of federalist relations, there must be no confusion as to the nature of the obligation in this case. Nothing in this Court's actions interferes with the efforts of the Commonwealth as to the enforcement of the criminal laws of Puerto Rico, or any other policy decision of that entity. The Commonwealth is being required to do only one thing in this action: adhere to the mandates of the United States Constitution. In the event internal policy decisions lead to the incarceration of individuals in institutions operated by the Commonwealth, the conditions of confinement must meet constitutional standards. The application of this principle of constitutional government to Puerto Rico scarcely interferes with the prerogatives of the Commonwealth.[13]

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[13] Moreover, although the Court's order is the product of federal constitutional considerations, it is worth noting that the current conditions of confinement violate commonwealth law as well. These laws are a forceful index of the values of Puerto Rico and suggest that in applying the requirements of the federal constitution to the operation of commonwealth institutions, the Court is not traducing on the prerogatives of the sovereign.

B. *Changed Circumstances*

[3] The more forceful argument advanced in support of defendants' motion for modification is that the circumstances extant at the time the stipulation was agreed to and entered as an order have changed. Defendants' factual allegations in support of this claim essentially condense the testimony of Dra. Otero during the May contempt hearing. Importantly, however, certain critical elements of that testimony are not set forth in defendants' brief. The salient points of Dra. Otero's testimony, as it relates to the changed circumstances advanced by defendants, are the following:

1. When Dra. Otero assumed the responsibilities of the position of Administrator of Correction, she knew that the problem of crowding in the institutions was the central issue to be addressed, and she began immediately to address it by developing plans for reduction of the population and expansion of available housing facilities. At least one of these plans was submitted to the Governor, urging immediate attention to the priority of crowding.

2. Dra. Otero was aware, early in her administration, that the internal planning efforts of the Administration had been adversely affected by inaccurate population projections.

3. The Administration of Correction commissioned a study of the correctional system in Puerto Rico, to be conducted by Multi Search, Inc. the report resulting from that study, usually referred to as the "Vargas Report" after the chief author, was completed in April 1986. The report predicted that the annual growth rate for the inmate population over the five-year period at the end of this decade would be 2.75%.[14]

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[14] The Vagas Report was introduced into the record of this litigation pursuant to a motion of plaintiffs, to which defendants did not object.

4. Aware of past inaccuracies in population prediction, and concerned about the apparent illogic of the estimate contained in the Vargas Report, the Administration of Correction revised the predicted growth upward to 9.1%.[15] It is important to note that the basis for this estimate is not in evidence, although Dra. Otero apparently attributed the projection to the Planning and Development Division of the Correction Administration.

5. It is apparent, however, that Dra. Otero did not have confidence in the accuracy of the 9.1% projection, which is understandable in view of the haphazard nature of the projection and the legacy of inaccuracy that has surrounded the effort to project the penal population in Puerto Rico.[16] While Dra. Otero was working on the population projections that informed the stipulation, she was developing contingency plans in the event the actual rate of growth in the inmate population exceeded the 9.1% figure.

6. In September 1986 the Stipulation was signed. Dra. Otero was aware at that time that the population was growing at more than 11% per year. Moreover, even a cursory review of the available data concerning population increases in 1986 discloses that from January 1, 1986, to

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[15] Indeed, Dra. Otero testified that she was aware, in fall 1985, that the rate of growth far exceeded the 2.75% figure advanced in the Vargas Report. As a simple example of the unreasonable nature of the Vargas predictions, the report predicted a total inmate population for 1990 of 6,352, a growth of only 600 inmates from April 1986, notwithstanding the fact that in the six months immediately preceding issuance of the report the population had grown by approximately 350 inmates.

[16] It is noteworthy that in projecting population in the late 1980s, allowance had to be made for the uncharted impact of determinate sentencing in Puerto Rico. The record does not reflect whether such allowance in fact was made. Inadequate assessment of that factor, alone, would substantially skew any projection.

September 1986 the inmate population had grown by 600 inmates, an annual rate of 17.34%.[17]

7. By the end of December 1986, Dra. Otero knew that the actual rate of growth in the inmate population was on the order of 17% per annum.

This body of testimony does not establish changed circumstances. Indeed, it is striking that the circumstances that existed, in fact, at the time the stipulation was entered into are essentially the same as those that obtain now. At most, defendants' claim is that they misapprehended the facts at the time of their agreement. The evidence does not even support this claim, as it appears that the 9.1% figure either did not, or should not have, controlled the projections upon which defendants' agreement to the stipulation was based. In any event it is clear that defendants should have known that the population projection figure on which they relied was, in all probability, inaccurate.

Moreover, even if defendants misunderstood the underlying facts relevant to population projections, and did not properly assess the information available at that time, they certainly knew by the end of 1986 that they had drastically underestimated the actual rate of growth. Yet, they did not make a motion for relief from the stipulation, did not informally apprise the Court of the predictable problems in compliance, did not solicit the assistance of the monitor and did not seek discussions with plaintiffs' counsel. Indeed, nothing was done to seek relief from the obligation when plaintiffs filed their motion for contempt. Only when the Court issued its order of July 23, finding defendants in contempt and imposing sanctions, did they seek to change the order. This sort of brinksmanship does not

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[17] This figure is derived by taking the increase in inmate population for the first eight months of 1986 (from 5432 to 6060) and projecting that rate of increase for an entire year.

speak well for the defendants' claim that their good faith efforts to comply were derailed by unanticipated problems in the growth rate, which necessitate the filing of the motion to modify.

One must be mindful of the content in which the stipulation was signed. In summer 1986, a contempt motion was pending alleging that defendants had failed, from the start, to comply with the September 1980 order concerning provision of 35 square feet of living space per inmate. The fact of noncompliance at that time is beyond question although ultimately the issue of contempt was never adjudicated. Thus, defendants faced the real possibility of contempt sanctions at the time the stipulation was signed. The four-month grace period from September to December was the product or negotiation and conscious choice by the parties, and certainly the December implementation date for the 35 square foot standard was not the product solely of defendants' internal calculations, however erratic or unreliable. "The parties engaged in arms-length bargaining and the detainees have a justified expectation that the bargain freely entered will be honored." *Duran v. Elrod*, 713 F.2d at 297.

Finally, even if changed circumstances were present, defendants have provided no support for the proposition that, by virtue of these changed circumstances, they should be relieved from the requirement of providing inmates with 35 square feet of living space. The underlying rights of inmates remain fully accrued, yet denied, and will until defendants take their obligations under the order seriously, and fulfill them. Had defendants established at the contempt hearing that all reasonable efforts to achieve compliance had been made—a showing they were unable to make—they might have availed themselves of a defense to a finding of contempt. That defense, however, is wholly separate from a claim that the underlying obligations should be altered, particularly when to do so would post-

pone further the vindication of the rights of the plaintiff class.

C. *Other Asserted Grounds for Modification*

[4] In addition to the basic grounds of consequences and changed circumstances, defendants urge on the court consideration of the scope of the 1987 building project and the degree to which that project has accomplished compliance with the goals of the crowding stipulation. Neither of these matters, even if established, warrants modification of the injunction. Sincere, thorough and effective efforts to comply with court orders are nothing more than what the law expects. The attempt to transform those efforts into relief from the underlying duty is unseemly. Indeed, the efforts made by defendants to comply with the injunction are more in the manner of defenses to contempt, and they were given plenary consideration as such by the Court in its adjudication of contempt. Those efforts will be considered here as grounds of modification to demonstrate that, even if relevant to modification, the facts do not support defendants' claim of diligence in attempting to comply.

The Court is aware, in great detail, of the building project undertaken by the Correction Administration in 1987 to increase dramatically the available beds for housing inmates. These efforts are hartening, and they suggest, it may be hoped, that the protracted course of inaction and dereliction that so long troubled this litigation may be at an end. Yet, building alone is not sufficient to constitute the form of resolute purpose and steadfast endeavor that shields a party from contempt, let alone provide a basis for relief from judgment.

The conditions of crowding in a penal system are the product of more than a shortage of beds, and there is reason to believe that active efforts by defendants on all fronts will be fruitful. Finding of Fact number 8 in the July 23 opinion found that "no coordinated efforts have

been made by the Commonwealth to control the flow of prisoners into or out of existing facilities." That finding is beyond challenge, and defendants do not attempt to suggest it is erroenous. Dra. Otero testified forcefully about her views of the desirability of increased numbers of halfway houses and alternatives to incarcerations. Yet, defendants have not even suggested, much less established, that efforts to pursue such alternatives have been made. The contract for transfer of inmates to the Federal Bureau of Prisons remained unfulfilled at the time of the hearing despite its important role in assisting the Administration in ameliorating crowding and its attendant problems. Defendants have undertaken no efforts to arrange for temporary housing as an interim solution to crowding of institutions. The process by which the amount of bail is set by judicial officers and the possibilities for expediting the posting of bonds to secure inmate releases, have not been the subject of intensive scrutiny and reasoned evaluation. There appears to have been no systematic assessment of sentencing practices in the Commonwealth.[18]

The Court is not required to suggest to defendants the routes they should pursue to further their efforts to depopulate; yet the listing of these essentially rudimentary matters suggests the extent to which defendants have fallen short of establishing that they have taken "all reasonable measures to exercise diligence, effective control and steadfast purpose, achieving the prescribed goals." *Aspira of New York v. Bd. of Education*, 423 F.Supp. 647,

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[18] The operation of the entire criminal justice system in Puerto Rico unquestionably is a prime element in the combination of circumstances that creates crowding in the penal institutions. That system has not been subjected to intensive scrutiny to ensure it operates appropriately in all its particulars in light of the limited incarceration resources available on the Island. Such an evaluation plainly is mandated by the pervasive crowding. In this regard it is worth noting that the Governor of the Commonwealth is a named defendant in this action.

651 (S.D.N.Y.1976). That gap cannot be bridged solely by the construction of new and renovated housing space.

To be sure, the construction has greatly increased the number of inmates housed in Puerto Rico who are afforded at least 35 square feet. Defendants' assertions in this regard are skewed by misconception, however, and when analyzed fall far short of establishing a basis for modification, even temporarily, of the order.

When a housing unit is overcrowded every inmate in that unit suffers deprivation of the rights guaranteed by the Court's order in that none of the inmates have the 35 square feet to which they are entitled.[19] This fact should not be diminished, yet defendants' contention seems to take little note of it.

Moreover, serious compliance problems exist at several institutions, including the State Penitentiary, the largest institution in Puerto Rico; Ponce, one of the most dilapidated; Vega Alta, where all female inmates are housed; and Aguadilla, an old and structurally obsolete institution. Taken together, these institutions house approximately one third of the members of the plaintiff class. The Court is unwilling to barter the rights of prisoners assigned to the overcrowded prisons against those fortunate enough to be housed elsewhere and conclude that, on balance, all is well. The crowding order guarantees rights to every member of the plaintiff class, wherever housed, and it applies to

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[19] The prospective sanction imposed in the July 23 order applies only to each inmate housed over the number that may be housed consistent with the provision of 35 square feet. This matter was clarified in a recent order. Plaintiffs have argued that, since every inmate in a crowded dormitory is deprived of his right to 35 square feet, the per capita fine should apply to each inmate so housed. This argument is entirely logical, and has considerable force. For now, the Court will stand by the position announced in its order of August 14, 1987. Should crowding continue to plague the institutions, the sanction might be adjusted to account for every inmate housed without minimally adequate living space.

every prison in Puerto Rico. The accomplishment of depopulation at some institutions is commendable, but the effort must be systemic in order to be effective, and its effects must be systemwide.

To the extent defendants have been conscientious in pursuing compliance, and have achieved it at some institutions, that fact is recognized by the connection between the prospective fine and the actual extent of noncompliance. To permit defendants to modify the underlying order, however, because they have attempted to obey the law and have had some success recently in doing so would exhibit disregard of settled legal principles and of the rights of inmates that are the subject of this litigation.

Projections of inmate population may be perilous. These perils aside, adherence to the long settled obligation concerning the provision of living space for inmates in Puerto Rican correctional institutions must not be postponed further. "A decree may not be changed in the interests of defendant if the purposes of the litigation have not been fully achieved." *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248, 88 S.Ct. 1496, 1499, 20 L.Ed.2d 562 (1968). In the end, indifference to law and nonchalance in obedience to duty is pernicious, in its direct consequences on the victims of neglect, and in its indirect effect on the quality of life in a society devoted to the rule of law. The order of the court approving the stipulation on crowding and adopting it as an order of the Court will not be modified.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIV. NO. 79-4(PG)

CARLOS MORALES FELICIANO, *et al*,
Plaintiffs

v.

RAFAEL HERNANDEZ COLON, *et al*,
Defendants

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U.S. DISTRICT COURT
SAN JUAN, P.R.

OPINION AND ORDER

This Court has held that overcrowding is at the center of the many ills which make the conditions of imprisonment in the Commonwealth penal institutions constitutionally unacceptable. Overcrowding inflicts on the plaintiff class subhuman living conditions and is the root for serious deficiencies in other areas of prison life. *Fisher v. Winter*, 564 F.Supp. 281, 298 (N.D.Cal. 1983).

Since *September 5, 1980*,[1] this Court directed defendants to provide each person in custody of the Administration

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[1] On September 5, 1980, this Court, after a hearing on a motion for emergency relief, found the penal system of Puerto Rico unconstitutional. The Opinion and Order, which granted relief to plaintiffs in several areas, directed that the goal of 35 square feet per inmate was to be achieved in stages within six (6) months from the date of the order. *Feliciano v. Barceló*, 497 F.Supp. 14, 41 (1980).

of Correction (hereinafter the Administration) with a minimum of 35 square feet of living space. This space requirement of 35 square feet was as a *temporary measure* which was to be eventually increased by the Administration to guarantee 70 square feet to each individually celled inmate and 55 square feet of living space to those housed in dormitories.[2]

In recognition of the urgency to comply with the Order of September 5, 1980, particularly as it pertains to the sleeping and living space for each inmate, the parties entered into a Stipulation on September 8, 1986. At the time of the stipulation a motion by plaintiffs seeking contempt penalties against defendants was pending before the Court. Plaintiffs expressly agreed as part of the stipulation[3] to withdraw said motion in exchange for defendants' undertakings of the stipulation upon the Court's approval of the terms of the stipulation. The Court provisionally approved the stipulation on September 26, 1986, in accordance with the recommendation set forth by the Court Monitors[4] in the *First Report of the Court Monitors (Crowding)*, filed on September 10, 1986. This provisional approval of the stipulation was conditioned upon the appropriate notice to the class and a Rule 23(e) Fed.R.Civ.P. hearing by the Court on the fairness of the stipulation. The hearing was

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[2] Such plans were to be provided within 90 days of the entry of the order.

[3] Thru article 10: *Scope of Agreement and Withdrawal of Plaintiffs' Motion Seeking Contempt Penalties*, the parties addressed said terms of the stipulation.

[4] On March 20, 1986, the Court entered a finding of continued unconstitutionality concerning the conditions of the penal institutions in Puerto Rico. Thru order entered on same date the Court appointed two monitors under Rule 53, Fed.R.Civ.P. The monitors were appointed to make current assessment with the state of defendants' compliance with the September 5, 1980, order to report on conditions and to prepare remedial orders directed to bring about constitutional conditions throughout the correctional system.

held on December 19, 1986. After said hearing, and having duly considered the terms of the stipulation, the recommendations of counsel and court monitors, as well as the objections raised by the prisoners, this Court approved and adopted as order of the Court the stipulation of September 10, 1986. At said time and through that same order the *First Report of the Court Monitors (Crowding)* was also confirmed in all respects. Once approved by the Court the parties became bound by the terms of the stipulation and obliged themselves to comply with the deadlines set forth therein in the implementation of its provision.

The approved stipulation requires the reduction of crowding throughout the whole penal system in Puerto Rico immediately.

The stipulation fixes the maximum population for the different institutions under the jurisdiction of the Administration, including inmates asigned to cells and dormitories and excluding those assigned to half-way houses and provides that each inmate housed in a dormitory shall be provided with no less than 35 square feet of living and sleeping space after December 31, 1986[5] (Article 1).

The stipulation also provides that as of December 1, 1986, only cells containing more than 70 square feet of floor space may be used as double occupancy cells and ennumerates the cells which may be used to house more than one prisoner (Article 2).

The conditions under which open celling may be maintained are also part of the regulatory provisions of the stipulation. Inmates in the open-celled areas must also be provided with the 35 square feet of living and sleeping space (Article 3).

The Administration is also required to provide at least 35 square feet of living and sleeping space to each inmate housed in a dormitory *commencing January 1, 1987.*

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[5] With the exception of all cells at Stop 8.

In Article 7 the maximum capacity figures of the institutions is fixed at 55 square feet. Article 7 proscribes that after *December 31, 1987*, any inmate housed in a dormitory be provided with less than 55 square feet of living and sleeping space.

The stipulation establishes for each existing institution the maximum population that can be housed in existing dormitory facilities at 35 square feet per inmate and 55 square feet per inmate and requires in general that any cell containing 70 square feet or less be used to house only one inmate. The most important exception to the latter requirement relates to "open celling" through which two inmates may be assigned to what otherwise would be a single occupancy cell under certain conditions.

The stipulation has three basic deadlines:

1. As of November 30, 1986, the State Penitentiary, including the area known as the Intensive Treatment Unit (UTI), was to house no more than 1151 inmates, all of whom would be confined in cells. The inmates in UTI were to be convicted inmates, and no more than one person could be confined to a cell at UTI. The rest of the State Penitentiary could be converted into "open celling" with double cell occupancy, provided that the inmates who were double celled were pre-trial detainees and also provided that certain enumerated conditions were maintained as to their care and custody.

2. As of December 31, 1986, the Administration was to provide 35 square feet of personal living space while observing certain minimum hygienic standards, and each institution was alloted a maximum number of inmates. As renovated or new living quarters became available, the square feet of personal living space to each confined prisoner or pre-trial detainee was to be raised to 50 feet.

3. As of December 31, 1987, the Administration was compelled to provide 55 square feet of living space to each person entrusted to its custody.

The plaintiffs allege that the Administration has failed to comply with the stipulation ever since it went into effect. Plaintiffs further maintain that defendants are in violation of the agreement and in contempt of the Court's order.

In support of their allegations of non-compliance plaintiffs refer to the *Second Report of the Court Monitors*, which is the report on defendants' state of compliance with the provisions of the Court's order on crowding, filed with the Court on February 27, 1987. The report is the product of the court appointed monitors on site inspections of the penal institutions throughout Puerto Rico during the period January 26-30, 1987.

During the course of these inspections and in the discharge of their duties the monitors proceeded to ascertain the compliance of the defendants with the capacity limits abscribed to each institution, as well as the extent of defendants' compliance with the Court's order on crowding based on the stipulation entered into by the parties on September 8, 1986, to which terms the parties were obliged to adhere.

The monitors' reports documented "serious instances of noncompliance with the terms of the stipulation" (Report at p. 4). Such problems include "institutional populations in excess of the stipulated capacities, maldistribution of populations within institutions depriving inmates of 35 square feet of living and sleeping space, and the use of unauthorized areas for housing" (Report at p. 4).

The report concludes that despite the depopulation efforts which have been made by defendants, "compliance problems of varying degrees of significance exist at most institutions under the authority of the Correction Administration" (Report at p. 66).

The report further points that some institutions house inmates in excess of the total capacity set forth in the

stipulation[6] (Report at p. 66). At the same time, the monitors adverted that several institutions also house inmates in violation of the stipulation because of a problem of maldistribution of inmates among the various housing units (Report at p 67).

Based on the situation of noncompliance, as described by the court monitors thru explicit findings in their reports and on plaintiffs' own knowledge of the violations to the stipulation, plaintiffs have moved the Court for a decree of contempt against defendants and for the imposition of sanctions for said failure. In plaintiffs' view, this is the only remedy available to counter the continuous delays and perpetuation of an unconstitutional system.

On May 27, 1987, the Court held a hearing on the matter. The superintendents of several institutions, to wit: 1) Víctor Ruiz Sárraga—Sabana Hoyos; 2) José L. Crespo—Aguadilla; 3) Clemente de Jesús—State Penitentiary; 4) Santos Amaro Félix—Ponce; 5) Efraín Vargas—Vega Alta; were all ordered to appear at the hearing. They were ordered to bring the following: 1) "Libro de Recuentos" (Book of Recounts) from December 31, 1986, to the present; 2) "Informes de Movimientos Diarios" (Daily Movement Reports) from December 31, 1986, to the present; 3) minutes of the treatment and classification committee from December 31, 1986, to the present; 4) the comprehensive, recorded daily institutional count, as well as the recorded daily population diary that divides the population of the institution among the various housing units to which inmates are assigned as ordered by the Court on March 27, 1987, to the present; 5) in case that the preceding were not available, then records, including log books, tally sheets, intake sheets or any other records or documents which show where the inmates, both pre-trial detainees and sentenced prisoners, classified or not classified, were

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[6] This is especially evident in the State Penitentiary and in Vega Alta.

being housed at the institution from December 31, 1986, until present.

The following is a summary of their testimony.

Vega Alta

The testimony of Efraín Vargas, Superintendent at Vega Alta Women's Industrial School, the only female institution in Puerto Rico, was the first one received during the hearing. Mr. Vargas testified that since December 1986 until the present the institution has been housing inmates over the allowed capacity every single day. Superintendent Vargas admitted that he has been aware of the Court's order fixing the maximum capacity but stated that the situation is beyond his control. He stated that all orders he has received for admission have been authorized by a Magistrate. He further stated that the situation has been brought up to the attention of the Administrator of Correction and to the Deputy Administrator,[7] but he has been told that if he does not take those prisoners, he shall be held in contempt.

Mr. Vargas stated that good-faith efforts have been made but that it has been practically impossible to comply with the order of the Court.

Mr. Vargas testified that since June and July of 1986 the population started to grow in an unforeseen way.[8]

The testimony revealed other violations of which the Administration had knowledge. For example, convicted inmates and pre-trial detainees were kept in the hospital and in Room B, and also throughout the institution.

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[7] A staff meeting with the Deputy Administrator in Charge of Penal Institutions, Dr. Miguel Poupart, within the presence of the Administrator and other superintendents, was held where the manner to loosen overcrowding was discussed.

[8] An example is that the pretrial detainees which had been in the high 40's had gone up to 95. (See Monitors' Report at p. 9).

Despite of alleged efforts of compliance, the foregoing violations remained unrebutted during the hearing.

Ponce

Mr. Santos Amaro Félix, Superintendent at the Ponce District Jail, also testified. His testimony evinced that although the stipulated capacity of the institution is 457, more than 457 have been housed there since December 31, 1986, to May 23, 1987. In fact, the population fluctuates between 500 and 572, and on May 11, 1987, it reached 583.

The testimony also disclosed other specific violations to the stipulation.[9]

State Penitentiary

The testimony of Clemente de Jesús, who had served as Superintendent for only three weeks, was also received. Mr. de Jesús stated that he was not aware of the stipulation until May 5, 1987.

The evidence presented disclosed manifest violations to the stipulation. Due to overcrowding and security five inmates were kept in a cell which housed only two.

On May 27, 1987, the population of the institution was of 1,365, in clear violation of the stipulation which fixed its maximum capacity at 1151.

There were also violations concerning the capacity at UTI, were thirty inmates in excess of the stipulation were kept therein and double celled also in contravention to the stipulation.

Also at the State Penitentiary the pretrial detainees and sentenced prisoners are kept together.

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[9] There were inmates at Ponce sleeping on the floor; two or three dormitories were having problems with overcrowding.

The previous superintendent at the State Penitentiary, Mr. José L. Jiménez Quiñones, was also called to testify. During his testimony further violations were established.[10]

Aguadilla

Mr. José A. Crespo, who has been Superintendent at Aguadilla since 1976, testified.

The total capacity of this institution is of 128 inmates. On May 25, 1987, there were 148 inmates but 20 were transferred to Guerrero on that day.

The superintendent stated that they had been complying until April, when they were ordered to receive inmates. On May 21, 1987, they received an order from the Administration that they had to move 20 inmates. These twenty were transferred to Guerrero. They will be evaluated and if the medical staff determines that they should not stay there, then they will be *returned, thus*, creating an excess over the allowed capacity.

Sabana Hoyos

Víctor Ruiz Sárraga, Superintendent at Sabana Hoyos since 1971, also testified. The institution's capacity was fixed at 460 inmates. By May 26, 1987, there were 482.

In this institution the pretrial and sentenced inmates are kept in the same housing unit.

Mr. Ruiz testified that no new facilities have been built to house inmates since 1980. With the testimony of Mr. Víctor Ruiz Sárraga plaintiffs rested their case.

The situation which prevails in the system, as had been described by the court monitors in their report, was substantiated by the testimonies of the superintendents elicited during the hearing.

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[10] There was absence of bed frames (just mattresses) and sheets at the B-2 cells and modules. There were mattresses on the floors, and during a visit in January mattresses were missing in some cells.

The Court further finds that the report rendered by the court monitors also presents additional cases of violation to the stipulation. The report discloses that particular individual housing units as opposed to institutions are overpopulated. Among these housing units are the Admission cellblock at Vega Alta (Report, p. 6); several dormitories at Bayamón (Report, p. 12); several dormitories at Guayama (Report p. 22); illegal use of cells at Stop 8 (Report p. 50); certain dormitories at Miramar (Report p. 52); several dormitories at Humacao (Report p. 53); two dormitories at Arecibo (Report p. 60). No evidence was offered by defendants to rebut these findings of open violation to the stipulation.

Moreover, in subsequent filings[11] plaintiffs have submitted further uncontested facts. On July 3, 1987, the State Penitentiary had 424 prisoners in excess of the maximum capacity. Ponce was 35% in excess of capacity. The women's institution at Vega Alta had, in excess, 36 inmates. Aguadilla was over the rated capacity by 13 inmates, and Arecibo, Sabana Hoyos, Guavate, Limón and La Pica were all in excess of 90% capacity. The situation did not improve and by July 10, 1987, the State Penitentiary had 418 more inmates than it is supposed to have at 35 square feet. The annex UTI housed 55 pre-trial detainees, 62 minimum classification prisoners, 25 unclassified prisoners and 233 medium classified prisoners. This situation reveals that there are 69 maximum classified prisoners out of the 444 in a maximum security prison.

Ponce had 32 inmates above the limit, Vega Alta had 43 in excess, Aguadilla had 4 above the limit, and Sabana Hoyos 16 in excess. The reported facts disclose that at Guayama there were three dormitories over the limit. In Ponce some dormitories are 50% overcrowded and some

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[11] *See, Supplemental Motion in support of the imposition of contempt penalties*, filed on July 13, 1987, and *Further Report on Population*, filed on July 14, 1987.

nearly 100%. Two dormitories at Aguadilla are at 200%. At Vega Alta the "hospitalillo" area is 263% above capacity.

The testimony of Dr. Mercedes Otero de Ramos, the Administrator of Correction, was received during the hearing.

She declared that she proposed and had made a commitment to comply with the terms of the stipulation once it was signed. She was authorized to sign it by the Governor of Puerto Rico.

She admitted the reality of overcrowding in the penal institutions in Puerto Rico. As had been previously raised by written motions, Dr. Otero de Ramos alleged an unforeseen population increase[12] as the cause which has made strict compliance impossible.

Defendants have also maintained that they are under substantial compliance. They aver that the vast majority of penal institutions are in compliance with the September 1986 stipulation.

In view of the evidence before us the Court reaches the following

Findings of Fact

1. Defendants have failed to comply with the terms of the stipulation of September 8, 1986.

2. The constitutional rights of plaintiff class guaranteed to them by the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States have been violated and continue to be violated as a consequence of non-compliance with the terms of the stipulation of September 1986.

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[12] However, although the estimated projections of population increase were 5.1%, defendants were aware by December 31, 1986, that there had been an increase of 17% and no motion was filed

3. One of the causes for deterioration of the compliance at the State Penitentiary was the lack of administration capabilities on the part of the superintendent of that institution. This inefficiency resulted in delayed classification of prisoners and delays in transfers of classified prisoners from the State Penitentiary to other institutions.

4. On March 6, 1987, the Administration entered into a contract with the Federal Bureau of Prisons and the United States Marshal's Office permitting the transfer of up to 150 prisoners, including 15 female prisoners, to Bureau of Prisons facilities. [Defendants' *Second Motion in Compliance with Specific Provision of Court Order.*] As of May 28, 1987, only three transfers have been effected pursuant to this agreement.

5. Although the Administrator of Corrections assumed that the growth in prison population would be 9.1% annually when she approved the Crowding Stipulation, the stipulation is not conditioned upon that or any other rate of increase. No efforts were made to apprise the Court of any increase beyond 9.1% when it became apparent that the increase was greater.

6. Alternatives to incarceration for some classes of convicted and pre-trial prisoners are necessary in order for defendants to achieve compliance with the Court's order on crowding. These alternatives include more halfway houses.

7. The defendant Governor of Puerto Rico has been made fully aware of problems relating to crowding in penal institutions as those problems have occurred and persisted. The Crowding Stipulation, which was the basis of the Court's order, was approved by the Governor and the Secretary of Justice of the Commonwealth of Puerto Rico.

8. By and large, the only efforts that have been made to achieve compliance with the Court's order on crowding have involved the construction of new housing units for

prisoners. No coordinated efforts have been made by the Commonwealth to control the flow of prisoners into or out of existing facilities.

Conclusions of Law

In the instant case the Governor, the Administrator of Correction and the individual members of the Parole Board have failed to comply with the Court's orders stemming from the stipulation entered into by the parties and subsequently approved by the Court. The disregard of judicial authority constitutes a contempt of court. The United States district courts have inherent authority and duty to protect and effectuate their judgments and to punish disobedience of or resistance to their lawful orders and decrees. *Cooper v. Aaron*, 358 U.S. 1 (1958).

The power of courts to punish for contempt is a necessary and integral part of the independence of the judiciary, and it is absolutely essential to the performance of the duties imposed on them by law. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911). The basic proposition in contempt proceedings is that all orders and judgments of courts must be complied with promptly, *Maness v. Myers*, 419 U.S. 450 (1975).

Contempt of a federal court consists in 1) misbehavior by any person in the court's presence or so near thereto as to obstruct the administration of justice; or 2) misbehavior of any of its officers in their official transaction; or 3) disobedience or resistence to a court's lawful writ, process, order, rule, decree or command. 18 U.S.C. § 401. An act or omission in violation of an order of a court may subject a party either to criminal or civil contempt, or both *United States v. United Mine Workers*, 330 U.S. 258 (1947).

Contempt proceedings can be either civil or criminal in nature. The characterization of a proceeding as civil or criminal depends primarily upon the purpose for which a

contempt finding is sought and issued. *Gompers v. Buck Stove & Range Co., supra*, 221 U.S. 418; *Shillitani v. United States*, 384 U.S. 364, 369 (1966). Civil contempt is remedial in nature and generally designed either to coerce compliance with a court order or to compensate the plaintiff for any losses sustained.[13] *See, United States v. United Mine Workers of America, supra*, 330 U.S. at 303-304.

There is no right to trial by jury in a civil contempt proceeding.[14] *Shillitani v. United States, supra*, 384 U.S. 364.

The proof of the defendant's violations in a civil contempt proceeding must be clear and convincing.[15] *United States v. Rizzo*, 539 F.2d 458, 465 (5th Cir. 1976).

Although willfulness is a necessary element of criminal contempt, it is not of civil contempt. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949). Furthermore, the absence of willfulness does not relieve a party from civil contempt. Civil, as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses for damages sustained by reason of noncompliance. Since the purpose is remedial, it matters not with what intent the defendant did the

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[13] On the other hand, criminal contempt is designed to vindicate the Court's authority, and the relief in criminal contempt is punitive in the manner of any other criminal sentence. *Gompers v. Buck Stove & Range Co., supra*, 221 U.S. at 444; *G & C Merriam Co. v. Webster Dictionary Co.*, 639 F.2d 29, 40 (1st Cir. 1980).

[14] On the contrary, in criminal contempt proceedings, defendants are entitled to trial by jury, except for "petty offenses", which are those resulting in imprisonment of not more-than six months or a fine of not more than $500.00. *Bloom v. Illinois*, 391 U.S. 194 (1968).

[15] However, in a criminal contempt proceeding the violation of the order must be proven beyond a reasonable doubt. *Michaelson v. United States*, 266 U.S. 42 (1924).

prohibited act. *McComb v. Jacksonville Paper Co., supra,* 336 U.S. at 191.

In the instant case defendants have continuously alleged their impossibility to comply due to unforeseen circumstances. They maintain that there has been substantial compliance. It is clear that impossibility or inability to comply with the judicial decree is a valid defense to civil contempt charges. *United States v. Bryan,* 339 U.S. 323, 330-334 (1950).

However, the burden of establishing impossibility or inability to comply as a defense to civil contempt is on the party raising the defense. The party petitioning for an adjudication of civil contempt does not have the burden of showing that the respondent has the capacity to comply. *United States v. Rylander,* 460 U.S. 752 (1983); *United States v Fleischman,* 339 U.S. 349, 362-63 (1950); *NLRB v. Trans Ocean Export Packing, Inc.,* 473 F.2d 1612, 1616 (9th Cir. 1973).

It is established that a party against whom civil contempt sanctions are sought is not held to absolute compliance with the Court's order. If a party has taken all reasonable steps within its power to insure compliance with the orders, that party ought not be held in contempt. *Washington Metropolitan Area Transit Authority v. Amalgamated Transit Union,* 531 F.2d 617, 626 (D.C.Cir. 1976); *Sekaquattewa v. MacDonald,* 554 F.2d 396, 406 (9th Cir. 1976), *cert. denied,* 320 U.S. 931. However, if inability to comply is to serve as a valid defense to civil contempt, it must be demonstrated clearly and categorically. *Powell v. Ward,* 487 F.Supp. 917 933 (S.D.N.Y 1980), *aff'd as modified,* 643 F.2d 924 (2nd Cir. 1981).

The extent of the efforts needed to comply will vary with the cricumstances. *In re Westinghouse Elec. Corp. Uranium Contracts Litigation,* 563 F.2d 992, 997 (10th Cir. 1977).

In the instant case in spite of defendants' allegations, they have not clearly demonstrated their impossibility to comply. Defendants' arguments are unpersuasive. They represent more of what this Court has heard for years and which is evinced by the history of this lengthy and troublesome litigation. It has been held that defendants violate their obligations under a federal court order and, therefore, are subject to civil contempt sanctions if the order is violated by failures to diligence, effective control and steadfast purpose to effectuate the goals prescribed in the order. *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 713 (D.C.Cir. 1975); *Aspira of New York v. Board of Education of City of New York*, 423 F.Supp 647, 654 (S.D.N.Y. 1976).

Assertions of the good faith efforts to comply with the order are irrelevant. Intent is not an issue in civil contempt proceedings. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949). Defendants have failed to comply with the district court's order, *McDonald, supra*, at 191, and they have also failed to present a valid defense for their non-compliance. Budgetary limitations or inadequate resources can never be a valid justification for constitutional violations. *Lareau v. Manson*, 651 F.2d 96, 104 (2nd Cir. 1981); *Ahren v. Thomas*, 434 F.Supp. 873, 898 (W.D.Mo. 1977).

Such is the situation before us. Furthermore, the fact that efforts and improvement have been made leading to an increased degree of compliance does not protect a party from contempt where it has not established that further improvements would be impossible. *Fortin v. Commissioner of Mass. Department of Public Welfare*, 692 F.2d 790, 797 (1st Cir. 1982). Defendants' burden is a heavy one. *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970, 984 (11th Cir. 1986).

In this respect, no particular percentage of compliance can be used to define the substantiality of a party's com-

pliance. Substantiality depends on the circumstances of each case, including the nature of the interest at stake and the degree to which noncompliance affects that interest. *Fortin v. Commissioner, supra*, 692 F.2d 790, 795 (1st Cir. 1982) (94% compliance does not constitute substantial compliance where underlying rights vindicated by order are important).

Although diligence is relevant to the question of the ability to comply, evidence of diligence alone does not satisfy the burden on a party defending itself against contempt. The fact that efforts and improvements have been made does not prove that further improvement would be impossible. Indeed, the test of impossibility is particularly strict in cases in which the needs of the persons protected by the court's order are urgent. *Fortin v. Commissioner, supra*, at 796-797.

The fact that a party did not foresee the difficulty of compliance does not constitute a defense to civil contempt unless that party can establish that it took all reasonable measures to exercise diligence, effective control and steadfast purpose to effectuate the prescribed goals. *Aspira of New York v. Board of Education City of New York, supra*, at 651.

This Court applauds whatever advances have been achieved by the Administration. However, we cannot condone any further the perpetration of constitutional violation in open disregard to the Court's order and to defendants' own compromise to comply. The situation has continued for too long. The waiting time is over.

In view of the foregoing the Court finds that defendants the Governor of Puerto Rico, the Administrator of Correction and the members of the Parole Board of the Commonwealth of Puerto Rico have failed to comply with the orders of the Court and finds them in contempt.

The sanction imposed after a finding of civil contempt serves two functions: to coerce future compliance and to

remedy past noncompliance. *United States v. United Mine Workers*, 330 U.S. 258, 302-04 (1947).

In choosing sanctions designed to coerce future compliance, the district judge sitting in equity is vested with wide discretion in fashioning a remedy. *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2nd Cir. 1979).

In assessing the appropriate character of a remedy, the district court must consider the character and magnitude of the harm threatened and the probable effectiveness of any suggested sanction in bringing about the result desired. *United States v. United Mine Workers, supra*, at 304.

WHEREFORE, for their past non-compliance with the stipulation and the orders of this Court, it is hereby

ORDERED that the Governor, the Administrator of Correction and the members of the Parole Board of the Commonwealth of Puerto Rico shall pay as sanctions the amount of $50,000.00 for violations to the Court's orders.

The Court FURTHER ORDERS that a daily fine of $10.00 per inmate shall be paid whenever an inmate is held living in an institution where the maximum capacity has been exceeded. The same fine shall be paid whenever a prisoner is held living in a cell, dormitory or any other particular housing unit within an institution in conditions which contravene the terms of the stipulation concerning the required living space.

In the discharge of their functions, the monitors shall report to the Court on a weekly basis the extent of noncompliance for the purpose of computing any fines.

Any future fines imposed and based on the formula set above shall be paid at the Clerk's Office of this Court before 3:00 P.M. the Friday following the computation.

IT IS SO ORDERED.

San Juan, Puerto Rico, July 23, 1987.

/s/ Juan M. Perez-Gimenez
JUAN M. PEREZ-GIMENEZ
Chief U. S. District Judge

APPENDIX E

THE NATIONAL PRISON PROJECT

STATUS REPORT: THE COURTS AND PRISONS

A Summary
November 30, 1989

Entire Prison System Under Court Order or Consent Decree:

9 jurisdictions: *Alaska, Florida, Mississippi, *New Mexico, *Rhode Island, *South Carolina, *Tennessee, Texas, Puerto Rico

Major Institution(s) in the State/Jurisdiction Under Court Order or Consent Decree:

34 jurisdictions: *Arizona, *California, *Colorado, *Connecticut, *Delaware, Georgia, *Hawaii, *Illinois, *Idaho, *Indiana, Iowa, Kansas, *Kentucky, Louisiana, *Maryland, Massachusetts, *Michigan, *Missouri, *Nevada, *New Hampshire, New York, *North Carolina, *Ohio, *Oklahoma, Oregon, *Pennsylvania, *South Dakota, Utah, *Virginia, *Washington, West Virginia, *Wisconsin, *District of Columbia, Virgin Islands

Formerly Under Court Order or Consent Decree-Currently Released from Jurisdiction of the Court:

3 jurisdictions: *Alabama, *Arkansas, *Wyoming

Pending Litigation:

9 jurisdictions: *California, *Connecticut, Georgia, Illinois, Massachusetts, Nebraska, *North Carolina, *Pennsylvania, *Utah

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* Asterisks indicate states/jurisdictions where the ACLU has been involved in the litigation.

Note: There is some overlap between the second and fourth categories because in some states where one or more facilities are under court order, others in that state are presently being challenged (e.g., Illinois).

Special Masters/Monitors/Mediators Appointed:

23 jurisdictions: *Alabama, *Alaska, *Arizona, *Arkansas, *California, *District of Columbia, Florida, Georgia, *Hawaii, *Idaho, *Illinois, Louisiana, *Michigan, *Nevada, *New Mexico, *Pennsylvania, *Rhode Island, *South Carolina, *Tennessee, Texas, Washington, West Virginia, Puerto Rico

Prison Systems Under Court Order and Cited for Contempt:

8 jurisdictions: *Alabama, *Michigan, Mississippi, *Rhode Island, Texas, Virginia, *District of Columbia, Puerto Rico

Not Involved (to date) in Overcrowding or Conditions Litigation

5 jurisdictions: Minnesota, Montana, New Jersey, North Dakota, Vermont

THE NATIONAL PRISON PROJECT

STATUS REPORT: THE COURTS AND THE PRISONS

November 30, 1989

Forty-one states (plus D.C., Puerto Rico and the Virgin Islands) are under court order or consent decree to limit population and/or improve conditions in either the entire state system or major facilities. (33 states are under court order or consent decree for overcrowding and conditions while 8 states are under court order or consent decree for conditions only). Only five states have never been involved in some type of litigation challenging overcrowding and/or conditions in their prisons. The following list spells out the status of each state's involvement.

1. *Alabama: The entire state prison system was under court order dealing with total conditions and overcrowding. *Pugh v. Locke*, 406 F.Supp. 318 (M.D. Ala. 1976), *aff'd in substance, Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S.Ct. 3057 (1978); Receiver appointed, 466 F.Supp. 628 (M.D. Ala. 1979). The district court entered an order establishing a four-person committee to monitor compliance with previous orders (1/13/83). In December 1984, district court relinquished active supervision after agreement of substantial compliance by the parties. The court dismissed the case in December 1988.

2. *Alaska: The entire state prison system is under a consent decree and a court order dealing with overcrowding and total conditions of confinement. *Cleary v. Smith*, No. 3AN-81-5274 (Superior Court for the State of Alaska, 3rd Jud.Dist., March 3, 1986). A partial settlement was obtained in October 1989. The court appointed a monitor for two years as part of the settlement.

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* Asterisks indicate states/jurisdictions where the ACLU has been involved in the litigation.

3. *Arizona: The state penitentiary is being operated under a series of court orders and consent decrees dealing with overcrowding, classification, and other conditions. Orders, August 1977-1979, *Harris v. Cardwell*, C.A. No. 75-185 PHX-CAM (D. Ariz.). A special maximum security unit was operating under a consent decree with an appointed monitor. *Black v. Ricketts*, C.A. No. 84-111 PHX-CAM, consent decree, December 12, 1985. The maximum security unit was found to be in full compliance with the consent decree and the case was dismissed in February 1988.

4. *Arkansas: The entire state prison system was under court order dealing with total conditions. *Finney v. Arkansas Board of Corrections*, 505 F.2d 194 (8th Cir. 1974). Special Master appointed, *Finney v. Mabry*, 458 F.Supp. 720 (E.D. Ark. 1978); on compliance, 546 F.Supp. 628. After a finding of full compliance, the federal court relinquished jurisdiction in August 1982.

5. *California: The state penitentiary at San Quentin is under court order on overcrowding and conditions. *Wilson v. Deukmejian*, #103454 Superior Court, Marin County. (Aug. 5, 1983). Order includes requirement that a Special Master be appointed. Decision overturned on appeal. The segregation units at San Quentin, Folsom, Soledad and Deuel are under court order because of overcrowding and conditions. *Toussaint v. Rushen*, 553 F.Supp. 1365, *aff'd in part*, 722 F.2d 1490 (9th Cir. 1984). Also see *Toussaint v. McCarthy*, 597 F.Supp. 1388 (N.D. Cal. 1984), entering permanent relief. Later opinion at 801 F.2d 1080, 40 Cr.L. 2066 (9th Cir. 1986). Two units at Soledad (Central and North) were held to be unconstitutional but the injunction was stayed pending appeal. *In re Daily* and *In re Rock* (Sup. Ct. Monterey). Decision overturned on appeal. The California Men's Colony is under a court order establishing population limits. *Dohner v. McCarthy*, 635 F.Supp. 408 (C.D. Cal. 1985). The California Institute for Men Reception Centers are operating under a settlement agreement providing for improved sanitation, classification, legal ac-

cess and other conditions. *Boyden v. Rowland*, CV-86-1989-HLH. In addition, there is pending litigation at the California Medical Facility, San Luis Obispo, and the Women's Prison at Frontera.

6. *Colorado: The state maximum security penitentiary is under court order on total conditions and overcrowding. *Ramos v. Lamm*, 485 F.Supp. 122 (D. Col. 1979), *aff'd in part and remanded*, 639 F.2d 559 (10th Cir. 9/25/80), *cert. denied*, 101 S.Ct. 1259 (1981), on remand, 520 F.Supp. 1059 (D. Col. 1981). Since the last reported opinion the parties have reached a series of six different consent decrees during the compliance stage. The various decrees were directed toward general conditions and specific areas, such as legal access, double bunking, treatment of HIV prisoners.

7. *Connecticut: The Hartford Correctional Center operated by the state is under court order dealing with overcrowding and some conditions. *Lareau v. Manson*, 507 F.Supp. 1177 (D. Conn. 1980), *aff'd*, 651 F.2d 96 (2nd Cir. 1981). Additional facilities under consent decree: Bridgeport Correctional Center, *Mawhinney v. Manson*, #B78-251 (D. Conn. 1982), and New Haven Correctional Center, *Andrews v. Manson*, #N81-20 (D. Conn. 1982), Morgan Street Correctional Center, Union Avenue Correctional Center. There is pending overcrowding litigation at Somers, *Bartkus v. Manson*, Civ. No. H-80-506, and at the Montville Correctional Center, *Foss v. Lopes*. Niantic Women's Prison is under a court order, *West v. Manson*, #H-83-366 (D. Conn. 10/3/84).

8. *Delaware: All major Delaware prisons are now under a consent decree filed in state count on issues of overcrowding, totality of conditions and access to the courts. *Dickerson v. Castle*, C.A. No. 10256 (November 22, 1988).

9. Florida: The entire state prison system is under court order dealing with overcrowding. *Costello v. Wainwright*,

397 F.Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 and 553 F.2d 506 (5th Cir. 1977). See also 489 F.Supp. 1100 (M.D. Fla. 1980), settlement on overcrowding approved. A Special Master has been appointed. Additional consent decrees have been entered covering health care, food service, urethane mattresses and fire safety. On 12/17/87 a consent decree was entered permanently enjoining the medical care system; it is significant that the state consented to the Eighth Amendment violation.

10. Georgia: The state penitentiary at Reidsville is under court order on total conditions and overcrowding. A Special Master was appointed in June 1979. *Guthrie v. Evans*, C.A. No. 3068 (S.D. Ga.). A number of other facilities are under challenge.

11. *Hawaii: The men's prison (O.C.C.C.) in Honolulu and the women's prison on Oahu are under court order resulting from a consent decree in a totality of conditions suit. *Spear v. Ariyoshi*, Civ. No. 84-1104 (D. Hawaii). Order entered June 1985 and monitors have been appointed. Consent decree amended in January 1986.

12. *Idaho: The women's prison is under a consent decree on conditions. *Witke v. Crowl*, Civ. No. 82-3078 (D. Id.), with an appointed monitor. The men's Idaho Correctional State Institution is under a court order on conditions. *Balla v. Idaho State Bd. of Correction*, 595 F.Supp. 1558 (D. Id. 1984).

13. *Illinois: The state penitentiary at Menard is under court order on total conditions and overcrowding. The Special Master was discharged after four years. There has been substantial compliance with the decree; however, the injunction remains in force. *Lightfoot v. Walker*, 486 F.Supp. 504 (S.D. Ill. 2/19/80). The state penitentiary at Pontiac was under a court order enjoining double-celling and dealing with overcrowding. *Smith v. Fairman*, 548 F.Supp. 186 (C.D. Ill. 1981), *rev.*, 690 F.2d 122 (7th Cir. 1982) (no proof of violence or long periods in cell). Liti-

gation is pending at other institutions. There is a pending equal protection case at Dwight Correctional Center, the women's prison. *Moorhead v. Lane.*

14. *Indiana: The state prison at Pendleton was found unconstitutional on total conditions and overcrowding. *French v. Owens*, 538 F.Supp. 910 (S.D. Ind. 1982), *aff'd in pertinent part*, 777 F.2d 1250 (7th Cir. 1985), *cert. denied*, ___ U.S. ___ (1986). The state penitentiary at Michigan City is under a court order on overcrowding and other conditions. *Hendrix v. Faulkner*, 535 F.Supp. 435 (W.D. Ind. 1981), *aff'd sub nom Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 3587 (1984). The state prison at Westville is under consent decree on overcrowding and conditions. *Anderson v. Orr*, C.A. No. S83-0481 (N.D. Ind., case filed 1983, NPP joined 1987). A comprehensive settlement was reached March 31, 1989.

15. Iowa: The state penitentiary is under court order on overcrowding and a variety of conditions. *Watson v. Ray*, C.A. No. 78-106-01, 90 F.R.D. 143 (S.D. Ia. 1981).

16. Kansas: The state penitentiary is under a consent decree on total conditions. *Arney v. Bennett*, No. 77-3132 (D. Kan. 1980). The case was reopened in January 1988 and culminated in a consent decree in April 1989. Temporary injunctive relief was sought and obtained. Included in the decree is that all the old facilities and any new construction are required to meet ACA and NCHC standards. The mental health issues are being litigated.

17. *Kentucky: The state penitentiary and reformatory are under court order by virtue of a consent decree on overcrowding and some conditions. *Kendrick v. Bland*, 541 F.Supp. 21 (W.D. Ky. 1981) (consent decree entered). On appeal, the court of appeals affirmed virtually all of the district court's orders, 740 F.2d 432 (6th Cir. 1984). The women's state prison is under court order on a variety of conditions. *Canterino v. Wilson*, 546 F.Supp. 174 (W.D. Ky. 1982), and 564 F.Supp. 711 (W.D. Ky. 1983).

18. Louisiana: The state penitentiary is under court order dealing with overcrowding and a variety of conditions. *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977). In mid-1989 a federal judge *sua sponte* reopened the case and has initiated a state criminal probe into several matters and a Department of Justice probe into medical care. A temporary Special Master has been appointed and has submitted a report. Also, the Fifth Circuit consolidated all jail cases under one federal judge; monthly population reports are submitted to the judge for monitoring.

19. *Maine: The state penitentiary was challenged on overcrowding and a variety of conditions. The trial court granted relief only as to restraint cells and otherwise dismissed the complaint. *Lovell v. Brennan*, 566 F.Supp. 672 (D. Maine 1983), *aff'd*, 728 F.2d 560 (1st Cir. 1984).

20. *Maryland: A medium and the maximum security prisons were both declared unconstitutionally overcrowded. *Johnson v. Levine*, 450 F.Supp. 648 (D. Md. 1978), *Nelson v. Collins*, 455 F.Supp. 727 (D. Md. 1978), *aff'd*, 588 F.2d 1378 (4th Cir. 1978), on remand ___ F.Supp. ___ (D. Md. 1/5/81), *rev.* and *remanded*, 659 F.2d 420 (4th Cir. 1981)(*en banc*). A settlement agreement and consent decree were subsequently entered in both cases. *Johnson v. Levine*, now *Johnson v. Galley*, was consolidated with *Washington v. Keller*, now *Washington v. Tinney*, 479 F.Supp. 569 (D. Md. 1979), and another settlement agreement and supplement to the settlement agreement were entered in October 1987 and February 1988, respectively.

21. Massachusetts: The maximum security unit at the state prison in Walpole is being challenged on total conditions. *Blake v. Hall*, C.A. 78-3051-T (D. Mass.). A decision for the prison officials was *affirmed in part and reversed in part and remanded*, 668 F.2d 52 (1st Cir. 1981). Consent decrees prohibiting prisoners sleeping on the floor are in effect at MCI Concord, *Jacobs v. Fair*, #86-81758

(Suffolk Co.), and MCI Walpole *Nolan v. Fair*, #84-1360 (Norfolk Co.). These actions were brought in state court.

22. *Michigan: The women's prison is under court order. *Glover v. Johnson*, 478 F.Supp. 1075 (E.D. Mich. 1979); further order entered, 510 F.Supp. 1019 (1981). In *Glover*, the Department of Corrections was found in contempt for lack of compliance (9/14/89) and is to be fined $5,000/day if it does not devise a compliance plan by mid-January 1990 regarding educational and vocational programs equal to those offered males. Four men's prisons (Jackson, Marquette, Michigan Reformatory and Riverside) are under consent decree on overcrowding and other conditions. *U.S. v. Michigan*, No. G84-63, and under court order on issues not covered by consent decree in *Knop v. Johnson*, 685 F.Supp. 636 (W.D. Mich. 1988). Part of *Knop* is on appeal. A monitor was appointed. The Central Complex of Jackson is under a consent decree on the same conditions. *Hadix v. Milliken*, C.A. 80-73581 (E.D. Mich. 5/13/85).

23. Minnesota: The state has kept overcrowding in abeyance through use of sentencing guidelines which take the number of available prison beds into account. Also, individual facilities and the Department of Corrections have been responsive to the complaints raised by advocates for prisoners.

24. Mississippi: The entire state prison system is under court order dealing with overcrowding and total conditions. *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974).

25. *Missouri: The state penitentiary is under court order on overcrowding and some conditions. *Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979), on remand, 27 Cr.L. 2335 (W.D. Mo. 5/23/80). In 1982 a separate order was entered on medical issues.

26. Montana: As a sparsely populated state, Montana's prison population has been small. The prison population is now increasing and problems are occurring in the system.

27. Nebraska: No cases have been filed dealing with overcrowding; however, there is an equal protection and conditions case involving the Nebraska Center for Women at York. *Klinger v. Nebraska Dept. of Correctional Services*, C.V. 88-L-399.

28. *Nevada: The state penitentiary is under court order on overcrowding and total conditions. *Craig v. Hocker*, C.A. No. R-2662 BRT (D. Nev.) (consent decree entered 7/18/80). The new addition to state penitentiary is under court order on total conditions. *Phillips v. Bryan*, CVR-77-221-ECR (D. Nev.) (consent decree entered July 1983). Both cases have been consolidated with a new consent decree entered May 19, 1988. A monitor has been appointed.

29. *New Hampshire: The state penitentiary is under court order dealing with total conditions and overcrowding. *Laaman v. Helgemoe*, 437 F.Supp. 269 (D. N.H. 1977). An action is pending for contempt on certain portions toward the end of the year. Also, the state is seeking to modify the order based on changes in the law.

30. New Jersey: For years the state has been able to stave off massive overcrowding in the prisons by mandating that county jails take the overflow from the state system. Most of the 21 county jails are under court order. Now state prisoners are backing up into municipal lockups.

31. *New Mexico: The entire system is under court order on overcrowding and total conditions. *Duran v. Apodaca*, C.A. No. 77-721-C (D.N.M.) (consent decree entered 8/1/80). Special Master appointed June 1983. The district court's refusal to vacate the consent decree, 678 F.Supp. 839 (D. N.M. 1988), was affirmed by the 10th Circuit, ___ F.2d ___ (10th Cir. 1989), Nos. 89-2041 and 88-1442.

32. New York: While no state-wide comprehensive lawsuits have been brought, numerous prison facilities are

under court order and injunctive relief has been obtained for the following egregious conditions and practices: medical care (Bedford Hills and Green Haven);, dental care (Bedford Hills); fire safety (Bedford Hills); segregation conditions (Green Haven, Sing-Sing, Fishkill, Bedford Hills, Woodbourne and Taconic); protective custody conditions (Green Haven); mental health care for segregation prisoners (Attica, Bedford Hills). Cases are pending at Auburn, Attica, Clinton, Great Meadow, Sing-Sing. Also, major disturbances at Attica (1971) and Sing-Sing (1983) were both related to crowded conditions, lack of programming, and racial hostility, among other things. The New York system has had a phenomenal building program and has thus far kept one step ahead of massive overcrowding in the prisons. However, many major county jails are under court order for overcrowding, as well as the New York City system.

33. *North Carolina: In September 1985 a consent judgment was entered covering overcrowding, staff, programming, and medical services in the 13 units of the state system's South Piedmont area. *Hubert v. Ward*, C-C-80-414-M (W.D.N.C.). Compliance has been reached and the case is in a dormant stage; the court no longer has active supervision. A lawsuit was filed covering conditions and crowding at the Craggy Unit outside of Asheville, N.C. *Epps v. Martin*, A-C-86-162 (W.D.N.C.). Consent decree entered August 1987. A new prison has been completed and Craggy has been closed. Settlement was reached in *Small v. Martin*, 85-987-CRT (E.D.N.C.), in December 1988, covering the remaining 49 road camps on overcrowding and conditions. *Mutz v. Johnson* settled out of court, covering adequacy of mental health at the women's prison. Consent decree in *Stacker v. Stephenson* on overcrowding and general conditions at Caledonia Farm; population cap imposed; emphasis on security issues and reducing violence. Pending cases on overcrowding and conditions at

Odom Farm, *Barnet v. Allsbrook*, and Harnett Correctional Center, *Bass v. Stephenson*.

34. North Dakota: No cases have been filed dealing with overcrowding or conditions.

35. *Ohio: The state prison at Columbus was closed in 1985. *Stewart v. Rhodes*, C.A. No. C-2-78-220 (S.D. Ohio) (12/79). The state prison at Mansfield is being operated under a consent decree on various conditions. *Boyd v. Denton*, C.A. 78-1054A (N.D. Ohio 6/83), and the prison should be closed in 1990.

36. *Oklahoma: The state penitentiary is under court order on total conditions and the entire state prison system is under court order on overcrowding. *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1979). The district court's decision to retain jurisdiction to insure continued compliance was upheld, 708 F.2d 1523 (10th Cir. 1983). The district court relinquished jurisdiction in mid-1984 and that decision is on appeal. All original compliance orders are still in effect, although the court has ended active supervision. The facility remains under permanent injunction. This was recently tested, unsuccessfully, when the state asked to vacate or amend the original order so as to renovate closed housing due to overcrowding. The court determined that the order is in effect and would not amend because circumstances have not changed.

37. Oregon: The state penitentiary was under a court order on overcrowding. *Capps v. Atiyeh*, 495 F.Supp. 802 (D. Ore. 1980), appeal pending (9th Cir.), stay granted, 101 S.Ct. 829 (1981). On remand, the district court determined there were no Eighth Amendment violations, but there were constitutional deficiencies in medical care at the penitentiary, and fire safety and milk pasteurization process at the prison dairy farm. 559 F.Supp. 894 (D. Ore. 1982).

38. *Pennsylvania: The women's prison at Muncy is being challenged on equal protection and hazardous phys-

ical conditions (including fire safety violations) in *Beehler v. Jeffes*, 664 F.Supp. 931 (M.D. Pa. 1986). Most of the claims have been settled and vountarily dismissed; the asbestos claim is pending and plaintiffs are monitoring the abatement schedule. The state prison at Graterford is being challenged on total conditions *Hassine v. Jeffes*. An appeal is pending on the denial of class claims. The state prison at Pittsburgh is under court order to devise a plan dealing with double-celling; there are also medical and mental health issues. A monitor is to be appointed. *Tillery v. Owens*, ___ F.Supp. ___ (W.D. Pa. 1989).

39. *Rhode Island: The entire state system is under court order on overcrowding and total conditions. *Palmigiano v. DiPrete*, 443 F.Supp. 956 (D.R.I. 1977). A Special Master was appointed in September 1977. New population caps were imposed by order in June 1986. Various contempt orders have been entered. The First Circuit affirmed the trial court's opinions and orders of October 21, 1988 (contempt) and April 6, 1989 (sanctions) in all respects on August 21, 1989. The trial court ordered the fines to be used to create a bail fund to release low-bail detainees. *Palmigiano v. DiPrete*, 710 F.Supp. 875 (D.R.I. 1989).

40. *South Carolina: The state penitentiary is being challenged on overcrowding and conditions. *Mattison v. So. Car. Bd. of Corrections*, C.A. No. 76-318. The entire prison system is under a consent decree on overcrowding and conditions. *Plyler v. Evatt*, C.A. No. 82-876-O (1/8/85). Release order in summer of 1986 was affirmed by the court of appeals. Mediator has been appointed.

41. *South Dakota: The state penitentiary at Sioux Falls is under court order on a variety of conditions. *Cody v. Hillard*, 599 F.Supp. 1025 (D.S.D. 1984). Overcrowding order reversed on double-celling, 830 F.2d 912 (8th Cir. 1987).

42. *Tennessee: The entire system is under court order for overcrowding and conditions. *Grubbs v. Bradley*, 552 F.Supp. 1052 (M.D. Tenn. 1982). Population ordered reduced and a Special Master was appointed (December 1982). Court enjoined new intake because of failure to comply with population reduction orders. Order, 10/25/85. On October 4, 1989 the Sixth Circuit consolidated numerous local jail overcrowding cases regarding the presence of state prisoners in the jails into *Grubbs. Roberts v. Tenn. DOC* and *Carver v. Knox Co. Sheriff*, ___ F.2d ___ (6th Cir. 1989). A Special Master is to be selected to monitor the jails; population caps have been recommended. The Tennessee State Prison in Nashville is under court order to be closed.

43. Texas: The entire state prison system has been declared unconstitutional on overcrowding and conditions. *Ruiz v. Estelle*, 503 F.Supp. 1265 (S.D. Tex. 12/10/80), stay granted and denied, 650 F.2d 555 (5th Cir. 1981), stay granted and denied (5th Cir. 1/14/82). A Special Master has been appointed. On appeal, the district court order was *affirmed in part, vacated in part* and *vacated without prejudice* in part for further hearings. 679 F.2d 1115 (5th Cir. 1982). A stipulation was reached and a consent decree entered on the crowding issue in 1985. A contempt order was entered by the district court on December 3, 1986. *Ruiz v. McCotter*, H-78-987-CA (S.D. Tex.). The contempt order was vacated April 27, 1987; no fines had been imposed. During the summer of 1989 private prisons were added as defendants. *Ruiz v. Lynaugh*. Because of overcrowding and backlog into county jails, county jail litigation implicates *Ruiz*; the judges send the cases back and forth. The Special Master's office in Texas is scheduled for termination March 1990.

44. Utah: The state penitentiary is being operated under a consent decree on overcrowding and some conditions. *Nielson v. Matheson*, C-76-253 (D. Utah 1979). Prior consent decree had been ignored because it was considered

to have no teeth. A new suit challenging double-celling was filed, *Baker v. Deland*. A temporary restraining order regarding double-celling was obtained in June 1989. Soon afterward, contempt proceedings were brought regarding double-celling set for December 1989.

45. Vermont: State prison closed in late 1970s. Extensive use of community correctional facilities. Higher security prisoners sent to other states.

46. *Virginia: The state prison at Powhatan is under a consent decree dealing with overcrowding and conditions. *Cagle v. Hutto*, 79-0515-R (E.D. Va.). The maximum security prison at Mecklenburg is under court order dealing with various practices and conditions. *Brown v. Hutto*, 81-0853-R (E.D. Va.) (consent decree entered April 1985). The state penitentiary at Richmond was challenged on the totality of conditions. *Shrader v. White*, C.A. No. 82-0247-R (E.D. Va.). Trial court dismissed the complaint in June 1983. The court of appeals *affirmed and remanded in part*, 761 F.2d 975 (4th Cir. 1985). The remand was settled in 1987, covering security issues.

47. *Washington: The state reformatory is being challenged on overcrowding and conditions. *Collins v. Rhay*, C.A. No. C-7813-V (W.D. Wash.). The state penitentiary at Walla Walla has been declared unconstitutional on overcrowding and conditions and a Special Master has been appointed. *Hoptowit v. Ray*, C-79-359 (E.D. Wash. 6/23/80), *aff'd in part, rev'd in part, vacated in part and remanded*, 682 F.2d 1237 (9th Cir. 1982). In a later appeal, *Hoptowit v. Spellman*, 753 F.2d 779 (9th Cir. 1985), the court of appeals affirmed the findings of the district court on remand with respect to the conditions of confinement and remanded the case for the entry of an order, which was filed April 10, 1986. Defendants' motion to dissolve the injunction was denied on May 22, 1987.

48. West Virginia: The state penitentiary at Moundsville is under court order on overcrowding and conditions. *Crain*

v. Bordenkircher, #81-C-320R (Circuit Court, Marshall County 6/21/83). Decision affirmed by West Virginia Supreme Court in 1986. A Special Master has been appointed. The West Virginia Supreme Court ordered the state penitentiary at Moundsville closed by mid-1992. *Crain v. Bordenkircher*, 44 Cr.L. 2374 (W.Va. Sup. Ct. App. 1989). The Huttonsville Correction Center is also under court order with respect to conditions. *Nobles v. Gregory*, #83-C-244 (Randolph Co. Cir. Ct. 2/22/85). On-going enforcement proceedings continue.

49. *Wisconsin: The state prison at Waupun is under a court order on overcrowding. *Delgado v. Cady*, 576 F.Supp. 1446 (E.D. Wisc. 1983).

50. *Wyoming: The state penitentiary was being operated under terms of a stipulation and consent decree. *Bustos v. Herschler*, C.A. No. C76-143-B (D. Wyo.). The federal court relinquished jurisdiction in early 1983 and that prison is now closed.

51. *District of Columbia: The District jails are under court order on overcrowding and conditions. *Inmates of D.C. Jail v. Jackson*, 416 F.Supp. 119 (D.D.C. 1976), *Campbell v. McGruder*, 416 F.Supp. 100 and 111 (D.D.C. 1976), *affirmed and remanded*, 580 F.2d 521 (D.C. Cir. 1978). On remand, court ordered limit on period of double-celling and increase in staff, 554 F.Supp. 562 (D.D.C. 1982). In 1985, the district court held conditions at the jail required an order that intake be enjoined. A consent decree requiring reduction in population entered August 22, 1985. *Inmates of D.C. Jail v. Jackson*, #75-1668 (D.D.C.). Several facilities at the Lorton Complex, the District's prison, are under court order for overcrowding and conditions. There are population caps in place in both the Central Facility and the Maximum Security Facility. *Twelve John Does v. Barry*, #80-2136 (D.D.C.) (Central); *John Doe v. District of Columbia*, #79-1726 (D.D.C.)(Maximum). Contempt orders entered. *Twelve John Does v. District of Columbia*,

855 F.2d 874 (D.C. Cir. 1988). On December 22, 1986, Lorton's medium security Occoquan facilities came under court order and a population cap was imposed. *Inmates of Occoquan v. Barry*, 650 F.Supp. 619 (D.D.C.), *vacated and remanded, 844 F.2d 828 (D.C. Cir. 1988)*, motion for rehearing *en banc* denied, 850 F.2d 796 (1988) (dissenting opinions and separate statements). Trial on remand in January 1989. Facility found unconstitutional in June 30, 1989 remand opinion and order; defendants ordered to devise a plan to alleviate constitutional violations. 717 F.Supp. 854 (D.D.C. 1989).

52. Puerto Rico: The Commonwealth Penitentiary is under court order on overcrowding and conditions. *Martinez-Rodrigues v. Jiminez*, 409 F.Supp. 582 (D.P.R. 1976). The entire Commonwealth prison system is under court order dealing with overcrowding and conditions. *Morales-Feliciano v. Barcelo*, 497 F.Supp. 14 (D.P.R. 1979). A Special Master was appointed in 1986. District court orders of contempt and daily fines have been affirmed by the First Circuit, ___ F.2d ___ (1st Cir. 9/26/89).

53. Virgin Islands: Territorial prison is under court order dealing with conditions and overcrowding. *Barnes v. Gov't. of the Virgin Islands*, 415 F.Supp. 1218 (D.V.I. 1976).

APPENDIX F

Prison Capacity and Inmate Population Table (January 1, 1987)

	Rated Capacity	Committed	Difference
AL	11,285	12,142	857
AK	2,428	2,588	160
AZ	12,280	12,095	-185
AR	5,530	5,503	-27
CA	46,279	77,739	31,460
CO	4,807	5,765	958
CT	7,153	11,320	4,167
DE	2,790	3,197	407
DC	6,946	10,815	3,869
FL	39,784	34,732	-5,052
GA	14,372	19,040	4,668
HI	2,152	2,324	172
ID	936	1,497	561
IL	20,100	21,081	981
IN	10,155	11,444	1,289
IA	3,223	3,353	130
KS	4,262	6,007	1,745
KY	6,375	6,227	-148
LA	12,330	12,139	-191
ME	934	1,352	418
MD	10,637	13,584	2,947
MA	4,893	8,385	3,492

[1] The source for the data on Puerto Rico is added on pursuant to Corrections Administration data, as of June 28, 1989. Rated capacity is at 55 sq. ft.

	Rated Capacity	Committed	Difference
MI	22,000	27,406	5,406
MN	2,976	3,040	64
MS	6,600	6,316	-284
MO	13,516	12,336	-1,180
MT	971	1,272	301
NE	1,651	2,259	608
NV	4,637	5,077	440
NH	809	1,137	328
NJ	12,565	15,244	2,679
NM	2,878	2,861	-17
NY	40,095	44,757	4,662
NC	14,767	17,300	2,533
ND	587	525	-62
OH	18,482	26,108	7,626
OK	7,010	10,281	3,271
OR	4,287	5,950	1,663
PA	12,972	17,929	4,957
RI	1,482	1,950	468
SC	12,388	13,740	1,352
SD	990	1,046	56
TN	7,754	7,554	-200
TX	41,252	40,450	-802
UT	2,402	2,063	-339
VT	597	794	197
VA	11,460	12,778	1,318

	Rated Capacity	Committed	Difference
WA	6,642	7,152	510
WV	1,425	1,470	45
WI	4,683	6,373	1,690
WY	898	1,097	199
FED	29,112	51,235	22,123
PR[1]	9,058	9,697	639
TOTAL	526,597	639,526	112,929

[1] The source for the data on Puerto Rico is added on pursuant to Corrections Administration motion data, as of June 28, 1989. Rated capacity is at 55 sq. ft.